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United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation,

Plaintiff in Error,

vs.

PETER SANDBERG and MATILDA SAND-
BERG, His Wife,

Defendants in Error.


Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Southern Division.

Filed

APR 3 - 1917

F. D. Monckton,
Clerk.



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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

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CHARLES T. PETERSON, Esquire, 1107 National
Realty Building, Tacoma, Washington,

Attorneys for the Defendants in Error.

[1*]

*In the District Court of the United States for the
Western District of Washington, Southern Divi-
sion.*

No. 1605.

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation,

Plaintiff,

vs.

PETER SANDBERG and MATHILDA SAND-
BERG, His Wife,

Defendants.

Praeceptum for Transcript of Record.

Filed February 21, 1917.

To the Clerk of the Above-named Court:

You will please prepare and certify to constitute
the record on appeal in the above-entitled case type-

*Page-number appearing at foot of page of original certified Transcript
of Record.

2 *American Surety Company of New York.*

written copies of the following papers, omitting all captions, excepting on the first page, omitting also all verifications, acceptances of service and other endorsements, excepting filing marks, said transcript of the record to be forwarded to and filed in the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to be printed there according to the rules of said Circuit Court of Appeals:

Original complaint.

Answer of the defendants as first filed.

Motion against that answer.

Order on ruling of Court on motion against that answer.

Reply of the plaintiff to the answers of the defendants.

Separate answer of Mathilda Sandberg filed at the time of trial .

Stipulation to try the case to the Court.

Stipulation about the exhibits.

Various orders for extension of time.

Bill of exceptions.

Findings of fact requested by the plaintiff.

Order denying these findings of fact.

Findings of fact requested by the defendants.

Exceptions of the plaintiff to the findings of fact as made by the Court.

Findings of fact as made by the Court. [2]

Judgment order and decree as made by the Court.

Stipulation about the exhibits and the order *or* the Court thereon for their transmission to the Circuit Court of Appeals.

Decision of the Court on the merits.

The petition for writ of error.

Order allowing the same.

Bond thereon.

Assignments of errors.

W. C. BRISTOL,
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 21, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [3]

Complaint.

To the Honorable Judges of the Above-entitled Court:

The complaint of American Surety Company of New York exhibited by its attorneys thereunto authorized, against Peter Sandberg and Mathilda Sandberg, husband and wife, doth respectfully show, allege and represent:

Par. I.

That American Surety Company of New York is and was at all the times herein set forth a corporation created, organized and existing under and by virtue of the laws of the State of New York; that its principal office and place of business is and has been at all the times herein set forth in the city and State of New York; that it is authorized to do business in the State of Washington and is a duly licensed surety company in said State; that it is now a citizen and resident of the State of New York and not a citizen or resident of the State of Washington.

Par. II.

4 *American Surety Company of New York*

That Peter Sandberg and Mathilda Sandberg are husband and wife and both of them were at all the times herein mentioned and are now citizens and residents of the State of Washington and not of the State of New York and reside and have their fixed domicile in the city of Tacoma in the county of Pierce in the said State of Washington. [4]

Par. III.

That the plaintiff and the respective defendants are citizens and residents of different states and not of the same state.

Par. IV.

That the amount or value in controversy in this cause, exclusive of interest and costs, is more than the sum of three thousand dollars.

Par. V.

That Wells Construction Co. was at the times herein set forth a corporation created, organized and existing under the laws of the State of Washington and registered in British Columbia under the British Companies Act with a registered office in Vancouver in the Province of British Columbia, with its principal office and place of business in the city of Tacoma and State of Washington, and upon the 2d day of June, 1910, through its secretary, Joe Wells, made an application in words and figures as follows, to wit, for a correct bond as therein specified:

F. Reamended. 16M, 9'09.

Form C.

vs. Peter Sandberg and Matilda Sandberg. 5

State—Vancouver, B. C.

Agency—F. B. Lewis.

AMERICAN SURETY COMPANY.

of New York.

A. No. 78

Bond No. 797682

Capital and Surplus, \$5,500,000.

APPLICATION FOR CONTRACT OR BID
BOND.

Amount—\$25,000.00

NOTE—These should accompany this application:

1. Financial Statement, Form C 413 with schedules. [5]
2. Copy of Contract, or in case of a bid, of advertisement, instruction and bid showing date and signatures. (Copy contract to follow.)
3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Company's Office

Building

100 Broadway, N. Y.

Premium \$875.00

Place and Date

of this

Application.

Vancouver, B. C.

(Place)

June 2nd, 1910.

(Date)

To American Surety Company of New York:

Application is hereby made for a bond of suretyship, as follows:

1. Name, age, business address and residence.

In the case of a partnership add name and residence of each partner; in the case of a corporation add names and residences of the four principal officers, and state date of organization, or incorporation, name principal holders of stock and bonds, if any.)

Wells Construction Company, a Company registered in B. C. of Tacoma, Washington, U. S. A. J. P. Wells, Manager and secretary, Simon Mettler, President; Geo. E. Vergowe, Vice-President.

2. Name and address of obligee: Powell River Paper Company, of Vancouver, B. C.

(If an agent, officer or board, give full description as per contract, specifications and bond.)

3. Place and date of bid opening, if any.

Bid.)

4. Contract) for construction of dam and canal on Powell River, B. C.

5. Bid)

Contract) dated.

Bid) Price approxi

6. Contract) mate \$175,000.

7. Time for Completion: October 31st, 1910.
8. Penalty for delay: Not stated.
9. Grounds for extension of time:
10. Terms of payment, reserved percentage: 85% monthly—15% Reserve.
11. Does contract cover patent indemnity?
12. Terms and duration of guarantees of efficiency, maintenance and repairs, if any, in contract or specifications: None.
13. Date of bond: ———.
14. Amount of bond: \$25,000. [6]
15. If a bid bond, will it operate as a contract bond? ———
16. If a bid bond, not to operate, as a contract bond, amount of contract bond will be \$———; if not specified, then the amount in which surety on contract bond must justify will be, \$———.
17. Limit on time for suit: ———.
18. Name, title and address of architect or engineer in charge: N. O. Hardy.
19. If you bid for the contract, give other bids including highest and lowest:

Name.	Address.	Bid.
No others.		
20. State nature of business, and if carried on in other States, territories or countries, specify the same: ———. General Contractors, Vancouver, B. C., & Tacoma, Washington.
21. State number years previous experience as contractor: 10 years.
22. What other contracts have you on hand?

8 *American Surety Company of New York*

State contract price in each case and percentage of work completed:

Paving contract in Tacoma, \$130,000, 70% completed.

Storm Sewer Contract in Tacoma, \$24,612, 80% completed done in 40 days.

8 Story Building in Tacoma, \$45,000, 95% completed to be completed 15 June.

Metropolitan Bldg. in Vancouver, \$57,000, 5% completed.

Pacific Development Co. — excavation, 12000 25% completed.

Not taking any more work in Tacoma.

23. What arrangements have you made for supplies, materials, subcontracts, etc., in connection with the work provided for in said contract? Owner to furnish all materials—not subcontracting.
24. Do you carry life insurance? Name companies and amounts: Yes, all the principal officers carry from \$5,000 to \$35,000.
25. Do you carry employers' liability insurance? Name companies and amounts: Yes.
26. If you bid for the contract did you give a proposal bond? If so, state amount and names and residences of your sureties: No.
27. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result: No.
28. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? Yes. Principally by the

Title Guarantee & Surety Co. of Scranton,
[7] Pa. \$164,000 Bonds outstanding in
Tacoma.

29. Are you engaged or interested in any other line of business? If, so, state its nature, location, firm name, names of partners, etc.:
No.
30. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way become discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed: No.
31. References. (Bankers, merchants, supply houses and others with whom you have had contracts, preferred.)

Name.	Occupation.	Address.
Peter Sandberg,	Capitalist,	Tacoma, Wash.
John W. Link,	" ex-Mayor,	Tacoma, Wash.
Pacific National Bank,		" "
Stebbens, Walker Spinning,	Wholesale	" "
Tacoma Trading Company,	material men.	Tacoma, "

Should the AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, do hereby, in consideration thereof, jointly and severally undertake and agree:

I. That the statements contained in the forego-

ing application are true.

II. That the indemnitor will immediately pay the Surety at its office, 100 Broadway, New York City, \$875 and \$875 on the 2d day of June in each year hereafter and until the indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from such suretyship, and all liability by reason thereof, and any and all renewals and extensions of the same, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination directly or indirectly fixing or discharging such liability.

III. That in the event of said Surety executing as surety or procuring the execution by sureties of the contract bond or bonds, required to be given if said contract or contracts be awarded to the applicant, or if said bond or bonds now applied for shall operate as such contract bond or bonds, or in the event of a contract being awarded and no contract bond required, the indemnitor will pay it, said Surety — per cent of the amount of such contract, award or orders annually in advance (no premium to be less than Ten Dollars, however); and the indemnitor does also agree that all the terms and conditions of this agreement shall cover and apply to the contract bond or bonds so executed.

IV. That the indemnitor will perform all the conditions of said [8] bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and

against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

V. That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminary to determining or fixing any liability which the Surety may be called upon to discharge by reason of such suretyship, and any and all renewals and extensions thereof, the indemnitor will immediately notify the Surety thereof in writing at its said office.

VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding

from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business.

VII. That the indemnitor will, upon the request of the Surety, procure the discharge of the Surety from said suretyship, and all liability by reason thereof, and any and all renewals and extensions thereof.

VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety its attorney for such purpose.

IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such

suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the surety. [9]

X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship.

XI. That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the principal named in the suretyship obligations, or of any persons acting on behalf of the principal or of the indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

XII. That any person making appraisals or

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valuations of property, or examinations of titles to property, or otherwise advising concerning the same, shall, whether nominated by the Surety, the principal, the indemnitor, or any other person, be deemed to be the agent of the principal and of the indemnitor and not of the Surety, notwithstanding that the person so acting may be an employee or other representative of the Surety Company.

XIII. That the liability of the indemnitor hereunder shall not in any wise be limited or discharged by any alteration, renewal, extension or modification of the suretyship which shall have been requested or assented to by the principal in said obligation named and by the Surety; but, on the contrary, all the terms of this agreement shall apply to any and all such alterations, renewals, extensions and modifications.

XIV. That upon notice to, or discovery by, the Surety of the failure of the indemnitor to comply with any provision of the contract above mentioned, the Surety may immediately take possession of such plant and materials as the indemnitor may own or have upon, or adjacent to, or intended to be used upon said work, so that the Surety may use the same in the prosecution of such contract, and right to possession of such plant and materials shall not be considered as waived by any delay on the part of said Surety to exercise said right. In the event of the principal named in said bond being declared in default by the obligee therein named, the Surety shall have the right to collect and receive all reserve percentages and all moneys due and to become due such

principal under said contract, and to hold and apply the same as collateral to this agreement.

XV. That the indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the indemnitor:

—and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of \$—— with authority to the Surety, on nonperformance [10] of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case said collateral is cash, to pay therefrom any sum which the indemnitor may become liable to pay the Surety by reason of any contract between the parties hereto; in case such security is the obligation of any person at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof or any substitutes therefor, or any additions thereto, without notice, at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or

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broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

Signed and sealed June 2d, 1910.

(Signed) WELLS CONST. CO.

" By JOE WELLS.

" JOE WELLS. (Seal)

Signed, sealed and delivered in the presence of:

(Signed) F. B. LEWIS.

ACKNOWLEDGE SIGNATURES ON THIS
PAGE.

Province British Columbia,
City of Vancouver,—ss.

On the second day of June, 1910, before me personally appeared Joe Wells to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

[Seal] (Signed) F. B. LEWIS.

Province of British Columbia,
City of Vancouver,—ss.

On the second day of June in the year 1910 before me personally came Joe Wells to me known, who being by me duly sworn, did depose and say: that he resided in Tacoma and that he is the Secretary of the Wells Construction Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of

directors of said corporation, and that he signed his name thereto by like order.

(Signed) B. F. LEWIS. (Seal) [11]

Par. VI.

But for the want of indemnitors said application was returned and thereafter, on or about and between the 15th and 20th day of June, 1910, a further application, as next hereinafter set forth, was made, signed and subscribed on the 15th day of June, 1910, at Vancouver in British Columbia, by Geo. E. Vergowe and A. H. Cederberg respectively, and on the 16th day of June, 1910, at the same place, by Joe Wells, and on the 20th day of June, at the City of Tacoma, in the State of Washington by Simon Mettler and Peter Sandberg, one of the defendants herein, and that said Peter Sandberg then and there signed and subscribed the same in order to enable the said Wells Construction Company to take and obtain, as it did in pursuance thereof take and obtain, construction contracts in which said Peter Sandberg was interested, and that said further application was in words and figures as follows, to wit:

18 *American Surety Company of New York*

Form C.

F. Reamended. 16M 9'09.

State—Vancouver, B. C.

Agency—F. B. Lewis.

AMERICAN SURETY COMPANY

of New York.

A. No. 82

(Eighty-two)

Capital and Surplus, \$5,500,000.

Bond No. 797682.

APPLICATION FOR CONTRACT OR BID
BOND.

Amount—\$25,000.00

NOTE—These should accompany this application:

1. Financial Statement, Form C 413 with schedules.
2. Copy of Contract, or in case of a bid, of advertisement, instructions and bid showing date and signature.

(Copy contract to follow.)

3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Company's Office

Premium \$875.00

Building,

100 Broadway, N. Y.

Vancouver, B. C.

Place and date

(Place)

of this

June 2d, 1910.

Application.

(Date)

To American Surety Company of New York:

Application is hereby made for a bond of suretyship, as follows:

1. Name, age, business address and residence.
(In the case of a partnership, add name and residence of each partner; in the case of a corporation add names and residences of the four principal officers, and state date of organization or incorporation, name principal holders of stock and bonds, if any.)
Wells Construction Company, a Company registered in B. C. of Tacoma, Washington, U. S. A. Jos. Wells, Manager & Secy., Simon Mettler, President, Geo. E. Vergowe, Vice-President. [12]
2. Name and address of obligee Powell River Paper Company of Vancouver, B. C. (If an agent, officer or board, give full description as per contract, specifications and bond.)
3. Place and date of bid opening, if any: ———.
4. Contract for Construction of dam and canal on Powell River, B. C.
5. Contract dated June 2d, 1910.
6. Contract price, approximate: \$175,000.
7. Time for completion October 31st, 1910.
8. Penalty for delay: Not stated.
9. Grounds for extension of time: ———.
10. Terms of payment, reserved percentage 85% monthly; 15% Reserve.
11. Does contract cover patent indemnity?
12. Terms and duration of guarantee of efficiency, maintenance and repairs, if any, in contract or specifications: None.
13. Date of bond; June 24th, 1910.
14. Amount of Bond: \$25,000.

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15. If a bid bond, will it operate as a contract bond?
16. If a bid bond, not to operate as a contract bond, amount of contract bond will be, \$———, if not specified, then the amount in which surety on contract bond must justify will be, \$———.
17. Limit on time for suit: January 31st, 1911.
18. Name, title and address of architect or engineer in charge: N. O. Hardy.
19. If you bid for the contract, give other bids including highest and lowest: No others.
20. State nature of business, and if carried on in other States, territories or countries, specify the same: ———. General Contractors, Vancouver, B. C. Tacoma, Washington.
21. State number years previous experience as contractor: 10 years.
22. What other contracts have you on hand? State contract price in each case and percentage of work completed:

Paving Contract in Tacoma, \$130,000, 70% completed.

Storm Sewer Contract in Tacoma, 24,612 80% completed, done in 40 days.

8 story building in Tacoma, 45,000, 95% completed to be completed 15 June.

Metropolitan Building in Vancouver, 57,000, 5% completed.

Pacific Development Co. excavation, 12,000, 25% completed.

Not taking any more work in Tacoma.
23. What arrangements have you made for supplies, materials, subcontracts, etc., in connection

vs. Peter Sandberg and Matilda Sandberg. 21

with the work provided for in [13] said contract? Owner to furnish all materials, not subcontracting.

24. Do you carry life insurance? Name companies and amounts: ———.

Yes, all the principal officers carry from \$5,000 to \$35,000.

25. Do you carry employers' liability insurance? Name companies and amounts: Yes.

26. If you bid for the contract did you give a proposal bond? If so, state amount and names and residences of your sureties: No.

27. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result: No.

28. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? Yes, principally by the Title Guarantee & Surety Co. of Scranton, Pa. \$164,000 Bonds outstanding in Tacoma.

29. Are you engaged or interested in any other line of business? If so, state its nature, location, firm name, names of partners, etc: No.

30. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way become discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed: No.

22 *American Surety Company of New York*

31. References. (Bankers, merchants, supply houses and others with whom you have had contracts, preferred.)

Name.	Occupation.	Address.
Peter Sandberg	Capitalist.	Tacoma Wash.
John W. Link	" ex-Mayor	Tacoma
Pacific National Bank		"
Stebbins, Walker	Spinning,	"
	wholesale material men	"
Tacoma Trading Co.		"

Should the AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, do hereby in consideration thereof, jointly and severally undertake and agree:

I. That the statements contained in the foregoing application are true.

II. That the indemnitor will immediately pay the Surety at its office, 100 Broadway, New York City, \$875.00 on the 2d day of June in each year hereinafter and until the indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from such suretyship, and [14] all liability by reason thereof, and any and all renewals and extensions of the same, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination directly or indirectly fixing or discharging such liability.

III. That in the event of said Surety executing or procuring the execution by sureties of the contract bond or bonds, required to be given if said contract or contracts be awarded to the applicant, or if said bond or bonds now applied for shall operate as such contract bond or bonds, or in the event of a contract being awarded and no contract bond required, the indemnitor will pay it, said Surety ——— per cent of the amount of such contract, award or orders annually in advance (no premium to be less than Ten Dollars, however); and the indemnitor does also agree that all the terms and conditions of this agreement shall cover and apply to the contract bond or bonds so executed.

IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship and any and all renewals and extensions thereof, and before it shall be required to pay the same.

V. That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminary to determining or fixing any liability

which the Surety may be called upon to discharge by reason of such suretyship, and any and all renewals and extensions thereof, the indemnitor will immediately notify the Surety thereof in writing at its said office.

VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way effect the Surety's license or right to transact business.

VII. That the indemnitor will, upon the request of the Surety, procure the discharge of the Surety from said suretyship, and all liability by reason thereof, and any and all renewals and extensions thereof.

VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and any

and all extensions [15] and renewals thereof, together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose.

IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.

X. That the Surety also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and

earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship.

XI. That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the principal named in the suretyship obligation, or of any person acting on behalf of the principal, or of the indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

XII. That any person making appraisals or valuations of property, or examinations of title to property, or otherwise advising concerning the same, shall, whether nominated by the Surety, the principal, the indemnitor, or any other person, be deemed to be the agent of the principal and of the indemnitor and not of the Surety, notwithstanding that the person so acting may be an employee or other representative of the Surety Company.

XIII. That the liability of the indemnitor hereunder shall not in any wise be limited or discharged by any alteration, renewal, extension or modification of the suretyship which shall have been requested or assented to by the principal in said obligation named and by the Surety; but, on the contrary, all the terms of this agreement shall apply to any and all such al-

terations, renewals, extensions and modifications.

XIV. That upon notice, or discovery by, the Surety of the failure of the indemnitor to comply with any provision of the contract above mentioned, the Surety may immediately take possession of such plant and materials as the indemnitor may own or have upon, or adjacent [16] to, or intended to be used upon said work, so that the Surety may use the same in the prosecution of such contract, and right to possession of such plant and materials shall not be considered as waived by any delay on the part of said Surety to exercise said right. In the event of the principal named in said bond being declared in default by the obligee therein named, the Surety shall have the right to collect and receive all reserve percentages and all moneys due and to become due such principal under said contract, and to hold and apply the same as collateral to this agreement.

XV. That the indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the indemnitor: and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of \$—— with authority to the Surety, on nonperformance of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case

said collateral is cash, to pay therefrom any sum which the indemnitor may become liable to pay the Surety by reason of any contract between the parties hereto; in case such security is the obligation of any person, at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof, or any substitutes therefore, or any additions thereto, without notice, at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

Signed and sealed June 15th, 1910.

WELLS CONSTRUCTION CO. (Seal)

(Signed) Per A. H. CEDERBERG,

Chief Engineer.

" SIMON METTLER. (Seal)

" GEO. E. VERGOWE. (Seal)

" PETER SANDBERG. (Seal)

" JOE WELLS. (Seal)

vs. Peter Sandberg and Matilda Sandberg. 29

Signed, sealed and delivered in the presence of:

F. B. LEWIS,

As to Wells Construction Co.

GEO. E. VERGOUE,

JOE WELLS,

ACKNOWLEDGE SIGNATURES ON THIS
PAGE.

Province of British Columbia,

City of Vancouver,—ss.

On the fifteenth day of June, 1910, before me personally appeared George E. Vergowe to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

[Seal]

F. B. LEWIS,

Notary Public. [17]

Province of British Columbia,

City of Vancouver,—ss.

On the fifteenth day of June, in the year 1910, before me personally came A. H. Cederberg to me known, who being by me duly sworn, did depose and say: that he resided in Vancouver, B. C., that he is the Chief Engineer of the Wells Construction Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that

he signed his name thereto by like order.

[Seal]

(Signed) F. B. LEWIS.

FOR MAKER OF A DEED.

797682.

I HEREBY CERTIFY that Joseph Wells personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office, at Vancouver, B. C., this sixteenth day of June, in the year of Our Lord one thousand nine hundred and ten.

[Seal]

(Signed) F. B. LEWIS,

A Notary Public in and for the Province of British Columbia.

797682.

I HEREBY CERTIFY that Simon Mettler personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office, at Tacoma, this 20th day of

June, in the year of Our Lord one thousand nine hundred and —.

[Seal] (Signed) JAMES E. BURKEY,
A Notary Public in and for the State of Washington.
,

797682.

I HEREBY CERTIFY that Peter Sandberg personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office at Tacoma, this twentieth day of June, in the year of Our Lord one thousand nine hundred and ten.

[Seal] (Signed) JAMES E. BURKEY,
A Notary Public in and for the State of Washington. [18]

Par. VII.

That on the 24th day of June, 1910, and in pursuance of said application and contract of indemnity of Peter Sandberg as aforesaid, the plaintiff made, executed and delivered its standard form of contract bond with Wells Construction Company as principal and itself as surety to Powell River Paper Company, Limited, of Vancouver, B. C., in the penal sum of twenty-five thousand dollars (\$25,000), conditioned, among other things, that if Wells Construction Company should indemnify the Powell

River Paper Company, Limited, against any loss or damage directly arising by reason of the failure of the Wells Construction Company to faithfully perform the said contract of the 2d day of June, 1910, for the construction of the aforesaid dam and the aforesaid canal on Powell River in British Columbia, then the bond should be void, otherwise to remain in full force and effect; that thereafter, and with the consent of Wells Construction Company and with its signature to the stipulation, it was stipulated in reference to said bond that the limitation date of suit or action to be brought thereon for damages, if any occurring, should be the 30th day of April, 1911, instead of the 31st day of January, 1911, as first in said bond set forth among the other conditions of said bond not now presently material hereto.

Par. VIII.

That on the 27th day of April, 1911, and within the time prescribed in said bond and for failure to perform the contract of June 2, 1910, Powell River Paper Company, Limited, in the Supreme Court of British Columbia, issued its writ and brought a suit against Wells Construction Company and American Surety Company of New York, the plaintiff herein, claiming and demanding under said contract of June 2, 1910, sundry and various large sums of money. [19]

Par. IX.

That on the 17th day of May, 1911, there was served upon the defendant Peter Sandberg at his then residence, being No. 1128 $\frac{1}{2}$ Pacific Avenue, in

the city of Tacoma, Washington, a notice of said suit or action so brought by Powell River Paper Company, Limited, against Wells Construction Company and this plaintiff, setting forth the writ and giving the particulars of said suit of action and notifying and requiring the said Peter Sandberg to appear and defend said suit in behalf of American Surety Company of New York, the plaintiff herein, and further notifying him, the said Peter Sandberg, that in the event he did not do so that he would be bound by the judgment rendered in said cause, but that the said Peter Sandberg did not comply with said notice or defend said suit or take any action or proceedings therein for and on behalf of this plaintiff or in defense of any part of said suit.

Par. X.

That thereafter such proceedings were had in said Supreme Court of British Columbia that on Monday, the 5th day of May, 1913, there was rendered and given, and thereafter entered on the 20th day of September, 1913, a judgment in said cause against Wells Construction Company and American Surety Company of New York for thirty-one thousand six hundred *thirty and* 94/100 dollars (\$31,632.94) and the penalty of said bond forfeited against said American Surety Company of New York and the said plaintiff herein was compelled to pay the whole and every part of said judgment, but the said defendant Peter Sandberg has not indemnified the plaintiff as in his aforesaid agreement of indemnity set forth nor repaid any part of the same to this plaintiff, although the said Peter Sandberg knew

and was notified thereof and demand made upon him so to do. [20]

Par. XI.

That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and indemnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.

Par. XII.

That in and by paragraph IX in said application and indemnity agreement hereinbefore referred to and in paragraph VI hereof described, it is, among other and various things, provided that the order, judgment or adjudication by reason of such suretyship shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability thereof to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of the said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement and that the suretyship was entered into for the special benefit of the said Peter Sandberg and the special benefit and

protection of Peter Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship and to both said clauses IX and X said Peter Sandberg agreed in addition to the other clauses in said agreement.

[21]

Par. XIII.

That the defendant Peter Sandberg contracted with the plaintiff in the manner aforesaid in the prosecution of the community estate, business and enterprise in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company and of contracts entered into between it and Powell River Paper Company, Limited, on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia and participation in profits derived from its operations in the Province of British Columbia and would and did further obtain the postponement of payment and discharge of indebtedness of Peter Sandberg and said community, estate and business from liability thereon to said Wells Construction Company.

Par. XIV.

That in and by said agreement of indemnity it is and was, among other and various things, also provided that all expenses, costs and charges to which said American Surety Company of New York should be put in and about the giving of said bond or the defense of any proceedings thereon should be paid and reimbursed to it by the said indemnitor, and that in

and about the maintenance of said suit and action of the said Powell River Paper Company, Limited, against said Wells Construction Company in said Supreme Court of British Columbia there was reasonably and fairly laid out and expended and incurred in and about said proceedings in said Court, in addition to the amount of said bond, the sum of fourteen hundred forty-nine and 85/100 dollars (\$1449.85), which the said Peter Sandberg in the aforesaid agreement of indemnity promised and agreed to repay, but that he has not done so nor has any part thereof been repaid.

WHEREFORE, American Surety Company of New York prays judgment against Peter Sandberg and Mathilda Sandberg, his wife, to [22] the extent of her interest whatever it may be, for the sum of twenty-five thousand dollars (\$25,000), with interest thereon from the 17th day of May, 1911, at six per cent. (6%) until paid, and for the further sum of fourteen hundred forty-nine and 85/100 dollars (\$1449.85) with interest thereon at the rate of six per cent. (6%) from the 22d day of September (1913, until paid, being an aggregate of twenty-six thousand four hundred forty-nine and 85/100 dollars (\$26,449.85) with interest on the main portions of said amounts from the respective dates above stated, together with costs and disbursements of this proceeding.

ELLIS LEWIS GARRETSON,
H. B. LAMONTE,
WM. C. BRISTOL,

Attorneys for American Surety Company of New
York. [23]

Answer.

Come now defendants, and make the following answer to plaintiff's complaint herein.

I.

Answering paragraph VI, defendants admit that defendant Peter Sandberg signed and subscribed the application for a contract bond, a copy of which application is set forth in said paragraph, but these defendants deny that he signed and subscribed said application in order to enable said Wells Construction Company to take and obtain construction contracts in which said Peter Sandberg was interested.

These defendants further allege that defendant Peter Sandberg signed said application for the sole use, benefit and accommodation of the said Wells Construction Co., and not for the use, benefit or profit of himself or his codefendant Mathilda Sandberg, nor of the community consisting of said defendants, nor for the aid, use and benefit of any purpose in which said defendants, or either of them, or the community consisting of said defendants was interested in any way whatsoever.

II.

Answering paragraph VII of said complaint defendants admit plaintiff executed the bond therein referred to, but deny each and every other allegation therein contained.

III.

Defendants have no knowledge regarding the allegations contained in paragraph X of said complaint, and therefore deny each and every of said allegations,

except that defendant Peter Sandberg has made no payments whatever to plaintiff, on account of said indemnity agreement. [24]

IV.

These defendants deny each and every allegation contained in paragraph XI of said complaint.

V.

Answering paragraph XII of said complaint defendants deny that defendant Peter Sandberg was substantially, beneficially or in any other way interested in the award and performance of said contract, or in obtaining said suretyship, and deny that said suretyship was entered into by said Peter Sandberg for his special benefit, or for the benefit and protection of his property, its income or earnings.

Defendants allege, as heretofore done, that said application and indemnity agreement was signed by defendant Peter Sandberg for the sole use, benefit, profit and accommodation of said Wells Construction Company, and not for the use, benefit or profit of either of these defendants, nor of the community consisting of them.

VI.

Answering paragraph XIII these defendants deny that defendant Peter Sandberg contracted with plaintiff in the manner set forth in the previous paragraphs in the prosecution of the community estate, business and enterprise, and in such a manner that the community would, and did, obtain the benefit of the continuance of the business of the Wells Construction Company, and of contracts entered into between it, and the Powell River Paper Company

Ltd., on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia, and deny that said defendants, or either of them, or the community consisting of them, were in *any whatsoever* interested in the participation of the profits derived from the operations of said [25] Wells Construction Company in the Province of British Columbia, and deny that defendant Peter Sanberg entered into said contract with the plaintiff under any understanding or agreement, express or implied, that he would thereby and did obtain the postponement of payment and discharge of any indebtedness whatever of himself, of said community estate and business from liability thereunder to said Wells Construction Company.

Defendants further allege that the execution of said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description, past, present or future, either to himself or his codefendant, or to the community consisting of them both, but as above alleged he signed the same as surety for the sole use, benefit, profit and accommodation of said Wells Construction Company, and not for the use, benefit, or profit of himself, or his codefendant, nor of the community consisting of them both.

VII.

Answering paragraph XIV defendants allege that they have not knowledge or information regarding the allegations therein contained, and therefore deny each and every thereof, except they admit that defendant Peter Sandberg has not paid to plaintiff any

portion of the part therein stated.

SECOND.

Further answering said complaint, and by way of a showing for affirmative relief herein, these defendants allege:

I.

That defendants are, and since November 30, 1894, have been, husband and wife.

II.

That defendants are the owners of community real [26] property in the counties of Pierce and King, in the State of Washington, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8 in Block 1101, and Lots 11 and 12, in Block 1303; in the city of Tacoma, as the same are designated upon a certain map entitled "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3d, 1875.

Also the following described tract:

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course of 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street

with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638, Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West $\frac{1}{2}$ of S. E. $\frac{1}{2}$, less 1 $\frac{38}{100}$ acres, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Section 12, Township 20, Range 7, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East $\frac{1}{2}$ of Southeast $\frac{1}{4}$, Section 10, Township 20, Range 8, King County, Washington;

All of which said property was acquired after the marriage of [27] defendants, and by their joint

efforts, and the same is the community property of defendants.

III.

That the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant Peter Sandberg as a surety, for the sole use, profit and accommodation of a third person, to wit, Wells Construction Company, as set forth in paragraph I of this answer, and was not executed for the use, benefit or profit of defendants, or either of them, nor the community consisting of defendants, and any obligation incurred thereby by the said defendant Peter Sandberg, is not a debt or obligation of the community consisting of these defendants.

Defendants further allege that if a judgment is rendered thereon against these defendants jointly, or against said defendant Peter Sandberg individually, it will be a cloud upon the title to the community real property of these defendants hereinbefore set forth.

WHEREFORE, defendants pray that said action be dismissed, and that they be allowed their costs herein.

Further, defendants pray that if any judgment be rendered herein against defendant Peter Sandberg that the same be adjudged and decreed to be a judgment against him individually, and that the same is not a debt or obligation of the community of these defendants, and that it is not, and does not constitute a lien upon the community real property of defendants, and that the real property hereinbefore set forth be adjudged to be the community property of defend-

ants free and clear of any judgment that may be entered herein.

BATES, PEER & PETERSON,

Attorneys for Defendants,

1107 Nat'l Realty Bldg.,

Tacoma, Washington. [28]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 26, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [29]

Motion of Plaintiff to Strike Out Parts of Answer.

The plaintiff, through its attorneys, moves the Court to consider of the answer herein as served on the 3d day of October, 1914, and grant an order striking out and expunging therefrom the following matter upon the following specific grounds:

I.

All of the matter in paragraph "I" of said answer commencing on line 24, page 1 of said answer, with the words "These defendants further allege," down to the end of line 2 on page 2 of said answer, in paragraph "I" thereof, ending with the words "in any way whatsoever," for the reason and upon the ground that the same is not responsive and material and is irrelevant and redundant and a legal conclusion and said matter does not present any issuable fact in connection with the paragraph of the complaint to which said matter in said answer is purported to be directed and said matter involves, if anything at all, a legal and ultimate question to be determined by this Court as matter of law, not as matter of fact.

II.

All of the matter contained in paragraph "IV" of said answer, lines 15 to 16, for the reason that said denial is frivolous and sham and because it is inconsistent with the admissions otherwise made in said answer.

III.

All of paragraph "V" of said answer, consisting of the matter on lines 18 to 30 on page 2 thereof, for the reason and upon the ground that the same is frivolous, and for the further reason that a party in pleading will not be permitted to deny the terms of his written contract, and for the further reason that said matter is not [30] a confession and avoidance of the contract signed by the said Peter Sandberg with the plaintiff, which the said Peter Sandberg otherwise in his said answer admits, and for the further reason that the same is a legal conclusion and involves the ultimate judgment to be passed by this Court as matter of law.

IV.

All of the matter commencing with the words "Defendants further allege," in line 22 of page 3 of said answer, paragraph "VI" thereof, down to and inclusive of the words "consisting of them both," on page 4 of said answer, for the reason that the same is a legal conclusion and not the statement of any fact, and for the further reason that a party is not permitted in pleading to deny his own contract without confessing and avoiding the same, and for the further reason that said matters present the legal questions to be adjudicated by this Court herein and do

not present issuable matters of fact tendering any issue herein.

V.

All of the matter contained in paragraph "III" of the affirmative matter contained in said answer on page 5 thereof, commencing at line 23 with the words "That the indemnity agreement," down to and inclusive of the words "hereinbefore set forth," in line 6 of page 6 of said answer, upon the ground that the same and the whole thereof is legal conclusion not matter of fact and tenders no issuable fact for trial herein but involves the ultimate determination and adjudication of this Court in said cause and is irrelevant and redundant matter.

This motion is based upon the complaint and answer filed herein and the other records, papers and files in the clerk's office in the federal courthouse at Tacoma, in this case. [31]

E. L. GARRETSON,
W. C. BRISTOL,
Attorneys for Plaintiff.

Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Oct. 9, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [32]

Order Granting Motion to Strike Parts of Answer.

This cause coming on for hearing upon the plaintiff's motion to strike out parts of defendants' answer; plaintiff being represented by its attorneys, W. C. Bristol and Ellis Lewis Garretson, defendants being represented by their attorneys, Bates, Peer &

Peterson, argument of respective counsel having been made, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED and ADJUDGED that paragraph II of said motion be, and the same is hereby granted, and paragraph IV of defendants' said answer is hereby stricken, and said answer with paragraph IV thereof thus stricken may stand as the amended answer herein.

That all of the remaining parts of said motion are hereby overruled, and denied, to which ruling plaintiff excepts, and its exception is hereby allowed.

Signed in open court this 29th day of October, A. D. 1914.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western District of Washington, Southern Division. Oct. 29, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [33]

Reply to Defendants' Answer.

Plaintiff, through its attorneys, reserving all manner of objection and exception that might arise to it upon its motion against the answer of the defendants herein, for reply to said answer as the same now stands:

Par. I.

Denies that the defendants or either of them, composing the community estate of Peter Sandberg and wife, were not interested in the making of the ap-

plication referred to in said answer; and denies that defendant Peter Sandberg signed said application for the sole use or benefit or accommodation of the said Wells Construction Company; and denies that Peter Sandberg did not sign the same for the use, benefit and profit of himself and his codefendant Mathilda Sandberg; and denies that Peter Sandberg did not sign said application for the use, benefit and profit of the community consisting of said defendants; and denies that said Peter Sandberg did not sign said application for the aid or use or benefit or any purpose of said defendants or either or both of them; and denies that Peter Sandberg did not sign said application for the use, benefit or profit of the community consisting of said defendants; and denies that the community consisting of said defendants was not interested in any way whatsoever therein or in the giving of said bond or of the matters and things that grew out thereof; and denies each and every matter and thing affirmatively set forth in paragraph I of said answer.

Par. II.

Denies that said application and indemnity agreement was signed by Peter Sandberg for the sole use, benefit, profit or accommodation of said Wells Construction Company; and denies that said application and indemnity agreement were not signed by the [34] defendant Peter Sandberg for the use, benefit and profit of both the defendants and of the community consisting of them; and denies all of the affirmative matter set forth and alleged in paragraph V of said answer.

Par. III.

Denies that the execution of said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description or that it was without consideration past, present or future, either to himself or his co-defendant or to the community consisting of them both; and denies that Peter Sandberg signed said application and indemnity agreement as surety for the sole use, benefit, profit or accommodation of said Wells Construction Company; and denies that he did not sign the same for the use, benefit and profit of himself and his codefendant; and denies that he did not sign the same for the use, benefit or profit of the community consisting of them both; and denies each and every matter and thing affirmatively set forth in paragraph VI of said answer.

REPLY TO THE SECOND PART OF THE ANSWER OF DEFENDANTS AND REPLY TO THE ALLEGED SHOWING FOR AFFIRMATIVE RELIEF THEREIN.

Plaintiff, through its attorneys, reserving and not waiving the same objection and exception as hereinbefore reserved, and further replying to the second part of said answer and to the alleged showing for affirmative relief therein.

Par. I.

Admits that the defendants are and have been since the 30th day of November, 1894, husband and wife. [35]

Par. II.

Admits that the defendants are the owners of

community real property in the counties of Pierce and King in the State of Washington as set forth and described in said answer on pages 4 and 5, but as to whether or not all of said property was acquired after the 30th day of November, 1894, or by their joint efforts or that the same or all of the same is the community property of the defendants, this plaintiff has not sufficient knowledge or information with which to form a belief or knowledge sufficient to answer and therefore denies the same and calls for proof thereof; and this plaintiff denies that the property described in paragraph II of said answer is all of the community property of the defendants.

Par. III.

Denies that the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant Peter Sandberg as a surety or for the sole use, profit or accommodation of a third person, to wit, Wells Construction Company; and denies that the same was not executed for the use and benefit and profit of defendants or both of them; and denies that the same was not executed for the use and profit and benefit of the community consisting of the defendants; and denies that any obligation incurred thereby and by the said defendant Peter Sandberg is not a debt or obligation of the community consisting of both the defendants; and denies that a judgment rendered against these defendants jointly or against the defendant Peter Sandberg individually would be a cloud upon the title of the community real property of the defendants in the answer set forth; and denies that the

rendition of a judgment alone in the State of Washington creates a lien or cloud or any other incumbrance upon title to real property, community or otherwise; and denies each and every matter and thing affirmatively set forth [36] in paragraph III of said affirmative answer.

AFFIRMATIVE REPLY CHARGING
ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:
Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that defendant Peter Sandberg signed the application set forth in the complaint for the sole use, benefit and accommodation of said Wells Construction Company and not for the use, benefit or profit of himself or his codefendant Mathilda Sandberg nor of the community consisting of said defendants nor for the aid, use or benefit of any purpose in which said defendants or either of them or of the community consisting of said defendants was interested in any way whatsoever, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive

of Bird v. Steele, in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor’s property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and [37] performance of such contract and obtaining such suretyship.”

—and further for that the said Peter Sandberg, at the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it upon community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they

are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

Par. II.

That plaintiff presents the aforesaid plea and the same plea to the affirmative matter set forth in paragraph V of the said answer of the defendants.

FURTHER AFFIRMATIVE REPLY CHARGING
ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:
[38]

Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that the execution of the said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description, past, present or future, either to himself or to his co-defendant or to the community consisting of both of them, but as above alleged he signed the same as

surety for the sole use, benefit, profit and accommodation of said Wells Construction Company and not for the use, benefit or profit of himself or his co-defendant or of the community consisting of both of them, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive of Bird v. Steele, in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor’s property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship.”

—and further for that the said Peter Sandberg, at

the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it [39] upon community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

Par. II.

That plaintiff presents the aforesaid plea and the same plea to the affirmative matter set forth in paragraph V of the said answer of the defendants.

FURTHER AFFIRMATIVE REPLY CHARGING ESTOPPEL.

Plaintiff, through its attorney, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:

Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant [40] Peter Sandberg as a surety, for the sole use, profit and accommodation of a third person, to wit, Wells Construction Company, as set forth in paragraph I of the answer, and was not executed for the use, benefit or profit of defendants, or either of them, nor the community consisting of defendants, or any obligation incurred thereby by the said defendant Peter Sandberg, is not a debt or obligation of the community consisting of these defendants, or that if a judgment is rendered thereon against these defendants jointly, or against said defendant Peter Sandberg individually, it will be a cloud upon the title to the community real property of these defendants hereinbefore set forth, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive of Bird v. Steele in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the

income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

—and further for that the said Peter Sandberg, at the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it upon [41] community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of

indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

**FURTHER AFFIRMATIVE REPLY CHARGING
ESTOPPEL.**

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:
Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say any of the matters or things attempted now to be set forth by these defendants affirmatively in their said answer, that is to say, either, first, want of consideration, or second, suretyship only, or third, accommodation for Wells Construction Company only, or fourth, that the community interest is not bound or intended so to be, or fifth, that the acts of the said Sandberg in the particulars charged in the complaint were not for the use and benefit and in the interest of the community, for that on the [42] 27th day of May, 1911, the said Peter Sandberg was personally served at his residence and at the residence of Mathilda Sandberg, his codefendant, at No. 1128½ Pacific Avenue, in Tacoma, in Pierce County, in the State of Washington, with a copy of a notice addressed to Wells Construction Company, Simon

Mettler, George E. Vergowe, Peter Sandberg and Joe Wells, in words and figures as follows, to wit:

“To the Wells Construction Company, Simon Mettler, George E. Vergone, Peter Sandberg and Joe Wells:

You, and each of you, are hereby notified that on June 2, 1910, you signed an application addressed to the American Surety Company of New York to execute a bond in the penal sum of Twenty-five Thousand Dollars, in favor of the Powell River Paper Company of Vancouver, British Columbia, to secure the performance on the part of the Wells Construction Company of a dam and canal on Powell River, British Columbia, and agreed in writing to indemnify said American Surety Company of New York for any loss thereunder.

You are further notified that on or about the 27th day of April, 1911, the Powell River Paper Company, Limited, the obligee in said bond, commenced an action by summons and writ in the Supreme Court of British Columbia, a copy of which said writ is as follows:

‘1911.

IN THE SUPREME COURT OF
BRITISH COLUMBIA
BETWEEN

P 514 POWELL RIVER PAPER COMPANY,
11W. M. LIMITED,

CANCELLED Plaintiff,
LAW. and

STAMP WELLS CONSTRUCTION COMPANY
50 cts. and AMERICAN SURETY COM-
PANY OF NEW YORK,
Defendants.

GEORGE V., by the Grace of God, of the United
Kingdom of Great Britain and Ireland, and of
the British Dominions Beyond the Seas, King,
Defender of the Faith, Emperor of India,

To

WELLS CONSTRUCTION COMPANY, a body
corporate having its head office in the Province
of British Columbia at the City of Vancouver
and to

AMERICAN SURETY COMPANY OF NEW
YORK registered in the said [43] Province
of British Columbia at said City of Vancouver.

WE COMMAND YOU, that within eight days
after the service of this Writ on you, inclusive of the
day of such service, you do cause an appearance to
be entered for you in an action at the suit of

POWELL RIVER PAPER COMPANY,
LIMITED

(S. C.
Seal)

AND TAKE NOTICE, that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

Seal of
the Supreme
Court
of B. C.

WITNESS, The Honourable GORDON HUNTER, Chief Justice, the 27th day of April, in the year of our Lord one thousand nine hundred and eleven.

N. B.—That Writ is to be served within twelve calendar months from the date hereof, or, if renewed, within twelve calendar months from the date of such last renewal, including the day of such date, and not afterwards.

Vancouver
Apr. 27,
1911.
Registry,

The defendant may appear hereto by entering an appearance, either personally or by solicitor, at the office of the District Registrar of this Honourable Court at Vancouver, British Columbia.

The Plaintiff's claim is against the defendant the Wells Construction Company for damages for breaches of an agreement dated the 2d day of June, 1910, and made between the plaintiff of the first part and the defendant the Wells Construction Company of the Second Part and against the defendant American Surety Company of New York under a bond dated the 24th day of June, 1910, duly executed by American Surety Company of New York conditioned

for the faithful performance by the Wells Construction Company of the said agreement of the second day of June, 1910, and which bond was extended by a bond dated the —— day of July, 1910, duly executed by American Surety Company of New York for indemnity in respect of said damages as in the said bond dated the 24th day of June is mentioned.

Endorsements:

1911.

In the Supreme Court of British Columbia.

Powell River Paper Company Ltd.

vs.

Wells Construction Co. and American Surety Company of New York.

General Form

Writ of Summons.

This Writ was issued by David Stevenson, Wallbridge of [44] the firm of Bowser, Reid & Wallbridge whose address for service is 505 Hastings St. West, Vancouver, B. C. Solicitor for the said Plaintiff whose registered office is Winch Building, Hastings Street, Vancouver, B. C.'

And you are hereby notified and required to appear and defend said suit in behalf of the American Surety Company of New York; and you are further notified that in the event you do not, you will be

bound by the judgment rendered in said cause.

(Signed) AMERICAN SURETY COM-
PANY OF NEW YORK,

By LIVINGSTON B. STEDMAN,
Its Resident Vice-President.

(Signed) HASTINGS & STEDMAN,
Attorneys for American Surety Company of New
York.

I accept service hereof on behalf of the Deft.
The American Surety Company of New York and
undertake to appear in due course.

Dated 27 April, 1911.

D. G. MARSHALL,
Deft. Solr.

D. S. WALLBRIDGE,
Plaintiff's Solicitor."

Par. II.

And thereby the said Peter Sandberg was fully
informed of the claim against this plaintiff and of
the said action that was pending and had full oppor-
tunity to defend the judgment.

Par. III.

That the said Peter Sandberg did not defend nor
pay or give any attention to the said notice so served
upon him and the said codefendant Mathilda Sand-
berg, although aware of said proceedings, did
nothing likewise.

Par. IV.

That they, the said defendants, are precluded and
estopped by the proceedings had and taken in the
Courts of British Columbia from now setting up or
being heard or allowed to allege or say any of said

matters or things, for that according to the law interpreted and adjudicated by the Circuit Court of Appeals of the Ninth Circuit in the case of *Burley v. Compagnie de Navigation Francise* [45] set forth and at large in 194 Federal at page 335, no such defense is permissible in this Court, for that all of the same could have been made in the courts of British Columbia in defense of the matters then litigated and the same are now *res adjudicata* as to both of said defendants.

WHEREFORE, this plaintiff prays that it may have judgment as prayed in its complaint and that the defendants have nothing by their said answer and that plaintiff have its costs and disbursements herein as originally prayed and that may be hereinafter sustained and expended.

W. C. BRISTOL,

ELLIS LEWIS GARRETSON,

Attorneys for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 7, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [46]

Separate Answer of Defendant Mathilda Sandberg.

Comes now defendant Mathilda Sandberg, and answering plaintiff's complaint, admits, denies and alleges:

I.

Answering paragraph VI thereof, defendant admits that defendant Peter Sandberg signed and sub-

scribed the application for a contract bond, a copy of which application is set forth in said paragraph, but defendant denies that said Peter Sandberg signed and subscribed said application in order to enable said Wells Construction Company to take and obtain construction contracts in which said Peter Sandberg, or this answering defendant, or either of them, was interested.

And further answering said paragraph defendant alleges that defendant Peter Sandberg signed said application for the sole use, benefit and accommodation of the said Wells Construction Company, a corporation, and not for the use, benefit or profit of himself, or this answering defendant, or either of them, nor of the community consisting of said defendants, nor for the use and benefit of, or for any purpose in which said defendants, or either of them, or the community consisting of said defendants was interested in any manner whatsoever.

II.

Answering paragraph VII of said complaint defendant admits that plaintiff executed the bond therein referred to, but denies each and every other allegation in said paragraph contained. [47]

III.

Defendant denies knowledge or information sufficient to form a belief as to the allegations made and contained in paragraph X of said complaint, and therefore denies the same, except that defendant admits that Peter Sandberg has made no payments whatever to plaintiff on account of said indemnity agreement.

IV.

Defendant denies each and every allegation made and contained in paragraph XI of said complaint.

V.

Answering paragraph XII of said complaint, defendant denies that defendant Peter Sandberg was substantially, beneficially or in any other manner or way interested in the award and performance of said contract, or of any contract, or in obtaining said suretyship, or any suretyship in which said Wells Construction Company, or any person connected with it was concerned, and denies that said suretyship was entered into by said Peter Sandberg for his special benefit, or for the benefit and protection of his property, its income or earnings, or for the benefit of the income, earnings or property of the community consisting of this answering defendant and said Peter Sandberg.

And further answering said paragraph, defendant alleges that said application and indemnity agreement was signed by defendant Peter Sandberg for the sole use, benefit, profit and accommodation of said Wells Construction Company and third parties, and not for the use, benefit or profit of this answering defendant, or of her codefendant Peter Sandberg, nor of the community consisting of this defendant and her codefendant Peter Sandberg.

VI.

Answering paragraph XIII defendant denies that defendant Peter Sandberg contracted with plaintiff in the manner set [48] forth in the preceding paragraphs of plaintiff's complaint, in the

prosecution of the community estate, business and enterprises, and in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company, and of contracts entered into between it and the Powell River Paper Company, Ltd., on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia, or at all, and denies that defendants, or either of them, or the community consisting of defendants, was in any way interested in, or participated in, or entitled to participate in the profits derived from the operations of said Wells Construction Company in the Province of British Columbia or at any other place, and denies that defendant Peter Sandberg entered into said contract with the plaintiff on any understanding or agreement that he, or defendant, or the community consisting of this answering defendant and said Peter Sandberg would thereby, and did obtain the postponement of payment and discharge of any indebtedness whatsoever of either of said defendants, or of said community, estate and business to said Wells Construction Company.

Further answering said paragraph defendant alleges that the execution of said indemnity agreement by defendant Peter Sandberg was without consideration either to himself or this answering defendant, or to the community consisting of defendants, or for the use, benefit or profit of defendants, or either of them, but was for the sole use, benefit, profit and accommodation of third parties.

VII.

Answering paragraph XIV defendant denies knowledge or information sufficient to form a belief regarding the matters and things therein set forth, and therefore denies the same, except defendant admits that defendant Peter Sandberg has not [49] paid to plaintiff any portion of the amounts therein referred to.

SECOND.

Further answering said complaint, and by way of an affirmative defense and demand for affirmative relief herein, defendant alleges:

I.

That defendant and her codefendant Peter Sandberg are, and since November 30th, 1894, have been, husband and wife.

II.

That defendants are the owners of real property in the Counties of Pierce and King, in the State of Washington, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Also the following described tract:

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along

the North line of lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington; [50]

West $\frac{1}{2}$ of S. E. $\frac{1}{4}$ less 1 $\frac{38}{100}$ acres, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Section 8, Township 8. Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7 King County, Washington;

North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Section 12, Township 20,

Range 7, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington.

East $\frac{1}{2}$ of Southeast $\frac{1}{4}$, Section 10, Township 20, Range 8, King County, Washington.

All of which said property was acquired after the marriage of defendants by their joint efforts and not by gift, bequest or inheritance.

WHEREFORE, defendant prays that said action may in so far as this answering defendant is concerned, be dismissed, and that she have a judgment for her costs herein.

Defendant further prays that if any judgment be rendered herein against her codefendant Peter Sandberg that the same be adjudged and decreed to be his separate debt, and that it be adjudged and decreed that the same is not a debt or obligation of the community consisting of this defendant and her codefendant Peter Sandberg, and that the same is not, and does not constitute a lien upon the community real property of defendants, and that the real property hereinabove described be adjudged to be the community property of defendants.

BATES, PEER & PETERSON,
Attorneys for Defendant, Mathilda Sandberg,
Office and Postoffice Address:
1107 Natl. Realty Bldg.,
Tacoma, Washington. [51]

Filed in the U. S. District Court, Western Dist.
of Washington, Southern Division. Jun. 4, 1915.

Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [52]

Stipulation to Try Cause to Court.

It is hereby stipulated that this cause shall be tried by the Court and before the Court without a jury.

W. C. BRISTOL and
ELLIS L. GARRETSON,
Attys. for Plaintiff.

BATES, PEER & PETERSON,
Attys. for Defendant.

Filed in the U. S. District Court, Western Dist.
of Washington, Southern Division. Jun. 4, 1915.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [53]

Opinion.

W. C. BRISTOL, ELLIS LEWIS GARRETSON,
for Plaintiff.

BATES, PEER & PETERSON, for Defendants.

DECISION ON THE MERITS.

CUSHMAN, District Judge.

Plaintiff sues to recover against the defendants on account of an agreement entered into by the defendant Peter Sandberg to indemnify the plaintiff in giving a bond for the performance by the Wells Construction Company of a certain contract for the construction of a dam and canal in British Columbia, for the Powell River Paper Company.

Plaintiff alleges the bringing of a suit in British

Columbia against it upon the bond; that it called upon the defendant Peter Sandberg to defend that action and that a judgment was obtained in such action against plaintiff in the sum of \$13,632.94. It alleges that, by paragraph 10 of the indemnity agreement, set out below, the defendant Peter Sandberg contracted with the plaintiff in the prosecution of the business of the community consisting of the two defendants and that the community thereby obtained the benefit of the continuance of the business of the Wells Construction Company and obtained the postponement of payment and discharge of indebtedness of Peter Sandberg and the community, estate and business from liability thereon to said Wells Construction Company.

Plaintiff asks judgment against Peter Sandberg and Mathilda Sandberg, his wife, to the extent of her interest [54] whatever it may be, for \$25,000 and interest, and the additional sum of \$1,449.85 and interest, the latter item on account of plaintiff's expenses in defending the suit against it in British Columbia.

Defendants, by separate answers, deny that either of them or the community formed by them was interested in the Wells Construction Company's contract with the Powell River Paper Company and aver that Peter Sandberg signed the application for the sole use, benefit and accommodation of the Wells Construction Company, without consideration to the defendants of the community and not in the prosecution of any business of the community. They deny that Peter Sandberg signed the application

with any understanding for the postponement of payment or discharge of any debt to the Wells Construction Company. Defendants interposed general denials to other portions of the complaint and set out the date of their marriage, a description of the community property and pray for a dismissal of the action and, in the alternative, that, if judgment be rendered against Peter Sandberg, that it be against him individually and that it be adjudged that the debt is not an obligation of the community; that it be adjudged that the defendants' property described in the answer is community property not subject to the lien of any judgment rendered.

Plaintiff, in its reply, denies that the defendant Peter Sandberg signed the application for the accommodation of the Wells Construction Company and avers that he did so for the benefit and profit of both defendants and the community. Plaintiff sets up the recitals of paragraph 10 of the application as representations of the defendant Peter Sandberg that he had an interest in the Wells Construction Company's contract and of the benefit to the defendants of plaintiff's suretyship, by way of estoppel, and [55] alleges that, at the time Peter Sandberg signed the application, the defendants were indebted to the Wells Construction Company to the amount sued for herein. Plaintiff further alleges the giving of notice to Peter Sandberg of the bringing of suit against it in British Columbia in which notice he was called upon to defend that action, and alleges that the judgment obtained in that action is *res adjudicata*.

In June, 1910, the Wells Construction Company applied to plaintiff for a surety bond in the amount of \$25,000. The application was denied for want of indemnitors. Thereafter, on the 20th of June, the same year, another application was made, signed by the Wells Construction Company and, among other indemnitors, the defendant Peter Sandberg. This application contained the following provisions:

“IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

* * *

“VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of

funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business. * * * [56]

"IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be prima facie evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special

benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

This application was upon a printed form, evidently prepared by the plaintiff. Upon this application, plaintiff executed its bond in the sum of \$25,000 to the Powell River Paper Company, conditioned for the indemnifying of that company against any failure on the part of the Wells Construction Company to perform its contract.

The evidence introduced shows that the defendants were married in 1894; that all of the real property described in their answers is community property. In view of the terms of paragraph VI of the application above set out, it is not necessary for the plaintiff to prove that it has paid or satisfied the judgment obtained against it in order to prevail.

Plaintiff and defendants have stipulated as to plaintiff's items of expense incurred in defending the suit in British Columbia in the amount of \$1,556.20. The effect of this stipulation is to amend the complaint to that extent.

A certified copy of the judgment obtained against it in British Columbia was offered by the plaintiff upon the trial. It [57] was objected to as not properly certified or authenticated. The copy purports to be certified as a true copy by A. B. Pottinger, District Registrar. There is impressed upon

the copy what purports to be the seal of the Supreme Court of British Columbia. A certificate is attached of David L. Wilbur, Consul General of the United States of America in Vancouver, B. C., to the effect that A. B. Pottenger is a duly appointed and commissioned registrar of the Province of British Columbia.

The objection made is that there is no certificate by the Consul General, or otherwise, that the signature to the copy is that of A. B. Pottenger. Further, that there is no certificate that A. B. Pottenger is the legal custodian of such records and that there is no certificate that the purported seal is the seal of said court.

Section 905, R. S., applies only to the authentication of records of judicial proceedings had in the states and territories. It is conceded that there is no statute providing for the authentication of judicial proceedings in foreign countries. No treaty touching the question has been called to the Court's attention. Justice Gray in *Hilton v. Guyot*, (159 U. S. 113, at 228), intimates that there is neither statute law nor treaty on the subject of foreign judgments.

The defendants in their answers deny upon information and belief the allegations of the complaint as to the rendition of the judgment by the Supreme Court of British Columbia against the plaintiff. Plaintiff now contends that, the judgment being a matter of public record, the denial is insufficient. Plaintiff did not move against this denial in the answer, but raises the question upon the argument

after the introduction of all the evidence.

The authorities are not uniform upon the question of [58] whether it is incumbent upon the plaintiff to move to strike out such denial as sham in order to take advantage of such situation. The weight of authority appears to be that he must do so.

1 Encyc. Pl. & Pr. 812, Note;

31 Cyc. 200, 201, Note 8.

In the Case of *Wallace v. Bacon* (86 Fed. 553), before Judge Ross, the matter came up on motion to strike the denials from the answer. Objections of a not dissimilar nature have been held waived by not moving against them as a step preliminary to trial.

Shepherd v. Baltimore etc. R. R. Co., 130 U. S. 426 at 433;

Keator Lbr. Co. v. Thompson, 144 U. S. 434;

Town of Denver v. Spokane Falls, 7 Wash, 226 at 229;

Howard v. Hibbs, 22 Wash. 513, at 516.

In *Peacock vs. United States* (125 Fed. 583), the motion to strike out a denial where there was presumptive knowledge on the part of the defendant, was held to be the appropriate remedy.

Where a motion to strike lies, a failure to interpose it, is held to be a waiver.

31 Cyc. 718-2.

In order to deprive the defendants of the right, under the code, to interpose such denial, the matter so denied must be presumptively within his knowledge.

1 Encyc. Pl. & Pr. 811;

31 Cyc. 200.

The defendant has been held to have such presumptive knowledge and not allowed to so deny allegations as to his personal acts, or those of his agent, or concerning public records to which he has access, or allegations that a judgment had been rendered against him. [59]

1 *Encyc. Pl & Pr.* 813 & 814.

No case has been called to the Court's attention where it has been held that the defendant is presumed to know matters of record in foreign countries and no persuasive reason has been advanced for so holding. The public record, the existence of which he may not deny upon information and belief, is a public record to which he has access, as the rule is stated in the *Encyclopedia of Pleading and Practice* above cited. A more exact statement of the rule is found in 31 *Cyc.* 200:

“Nor can facts which are readily accessible by reason of being public records, or otherwise, be put in issue by such form of denial.”

Having access in the sense in which these words are used includes, not only the legal right of access, but a reasonable opportunity to avail oneself of that right.

In the complaint it is alleged that both of the defendants are, and were at all times in question, citizens and residents of the State of Washington. It may be presumed that the defendants would have the right in British Columbia to examine the records of the Supreme Court, that is, it may be presumed that they are public records of that Province, but it is not reasonable to require a citizen of this

country to journey to foreign lands to inform himself concerning the contents of public records there in order to qualify himself to answer a suit brought against him in this country.

Having had notice of the pendency of the proceedings and been called upon to defend, defendant Peter Sandberg is now estopped to deny the conclusiveness of any judgment rendered.

Robbins v. Chicago, 4 Wall. 657; 18 Law Ed. 430;

[60]

Wash. Gas Light Co. v. District of Columbia,
161 U. S. 316; 40 Law Ed. 712 at 719;

Compagnie v. Burley, 183 Fed. at 168; aff'r'd
194 Fed. 335.

But, not having been a party to the action in British Columbia, nor shown to have had anything to do with its conduct, he has a right to insist on strict proof of the judgment, unless, in common with all citizens of this commonwealth, he is presumed to know the contents of the records of the courts of British Columbia.

Residents of this country are presumed to have knowledge of its laws and may be presumed to have knowledge of its records, but such does not apply to either the laws or the records of foreign countries.

In *Wallace v. Bacon* (86 Fed. 553), Judge Ross held a defendant in the Southern District of California to have presumptive knowledge of the levying of an assessment by the Comptroller of the Currency against a National Bank of the State of Missouri.

It may be said that the records of the Supreme Court of the Province of British Columbia are not

so distant as the records of which the defendant in that case was presumed to have knowledge, but, unless the fact of their being records of a foreign country is made the test, a party might be held to have presumptive knowledge of the records in Thibet or Patagonia. A party cannot in reason be required to acquaint himself with all the records of the countries of the globe. To draw the line at the boundaires of his own country seems more reasonable than to extend it to the confines of Christendom, or to the countries having the civil or common law, or all.

In *Oregon Ry. Co. v. Oregon Ry. & Nav. Co.* (22 Fed. 245), Judge Deady writing the opinion, it is said: [61]

“Now, upon the facts stated in this case, there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britain, by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding, and there is no evidence that it or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose. Neither is a party under any obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it, positively, unless it be to recall and verify that knowledge or information of the matter which he once had

and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstances. And if such a denial is improperly made, it may be stricken out as sham—manifestly false, in fact. But it is not for that reason either “frivolous” or immaterial.” That depends wholly on the character of the allegation denied. If that is material, the denial of all knowledge or information concerning it is also material” (at pp. 247 and 248).

This case was reconsidered in 23 Federal, 232. While nothing is said in the latter opinion to indicate a change in the rule as announced in the former case, the defendant was not allowed to question plaintiff’s corporate existence, the effect of the ruling being that, having contracted with the plaintiff as a corporation, defendant would be estopped to deny its corporate existence.

Cowie v. Ahrenstedt, 1 Wash. 416 at 418 & 419;

Vassault v. Austin, 32 Cal. 597.

The latter case is cited with approval in 1 Washington, at 419.

Having reached the conclusion that defendants’ denials were sufficient, it is not necessary to determine whether the plaintiff waived its right to object to the form of denial by not interposing a preliminary motion to strike from the answer.

No case has been cited holding a record of a foreign judgment certified as in this case, admissible in evidence. The only case found that appears to sustain its admissibility is an early case [62] in

Vermont. (Woodbridge v. Austin, 2 Tyler, 364, 4 Am. Dec. 740.) It was held in this case that the exemplifications of the record of a foreign judicial proceeding would be considered *prima facie* as correct. The great weight of authority, however, is to the contrary. (23 Cyc. 1611 and 1612, note 54.)

“In order that a foreign judgment should be admissible in evidence, it is necessary that the exemplification of it which is produced should be duly authenticated. And this authentication should consist of the seal of the court, if it has one, the certificate of the officer in whose custody the record remains, the attestation of the principal judge of the court to the official character of the person certifying, and the whole fortified by the certificate of the executive department of the state or country and the impress of its great seal.” (Black on Judgments, Vol. II, p. 849.)

Cruz v. O’Boyle, 197 Fed. 824.

No reason is shown for any exception in the present case to the rule embodied in the foregoing.

The defendant Mathilda Sandberg had no knowledge that Peter Sandberg had signed the application to plaintiff for its execution of the surety bond. All of the evidence is to the effect that neither of the defendants had any financial interest in the Wells Construction Company; that Peter Sandberg signed the application at the request of Simon Mettler, an old friend of his. Joseph Wells, the Secretary of the Wells Construction Company also asked him to sign, but he received nothing for so doing. There

was no understanding that he should receive anything.

The only matter between the defendants and the Wells Construction Company at the time of signing this application was that the Wells Construction Company was then constructing a building for defendants. This building was substantially completed and paid for at the time of the signing of this application. It was paid for entirely in cash by Peter Sandberg and there was [63] no consideration of value passed to either of the defendants on account of the signing of the application, nor was anything contemplated. The Wells Construction Company was then in good financial standing.

Under these circumstances, it is clear that the mere fact that the defendant Peter Sandberg had, at the time of signing the application, other contractual relations with the Wells Construction Company would not make him other than an accommodation indemnitor and, of itself, would not make a debt growing out of the indemnity agreement the debt of his wife or the community.

The fact that Peter Sandberg paid, direct, certain materialmen furnishing supplies for the construction of the Kentucky Liquor Company building under a contract with the Wells Construction Company is not unusual conduct under such circumstances. His becoming an indemnitor for the Wells Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that, thereby, he would protect any community interest in the completion of

the Kentucky Liquor Company building.

The community property statute of the State of Washington provides:

“Property not acquired or owned, as prescribed in sections 2400 and 2408 (by gift, devise or inheritance) acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with *alike* power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.”

Debts incurred by the husband in the prosecution of any business which, if successful, will result in profit to the community are community debts.

McDonough v. Craig, 10 Wash., 239, at 241. [64]

If all debts incurred by the husband are *prima facie* community debts, as indicated in the foregoing decision, that *prima facie* presumption is conclusively overcome by the evidence in the present case showing that no profit or benefit could result to the community from the act of Peter Sandberg in signing the application or from the transaction or business with which it was connected.

In Milne v. Kane (64 Wash. 254) and Woste v. Rugge (68 Wash. 90), where the community was held liable for the tort of the husband, it was only so held upon the finding that the tort committed by him while engaged in a business conducted for the benefit of the community.

In McGregor v. Johnson (58 Wash. 78), where the

community was held liable for the successful fraud practiced by the husband, it was only so held upon a finding that the wrongful profit from the fraud inured to the benefit of the community.

The community is liable where the husband signs an obligation as surety, or accommodation maker for a corporation in which he is a stockholder or director, but if not interested in such corporation at or prior to the time of incurring such obligation, the community is not liable.

Horton v. Donohoe Kelly Bank Co., 15 Wash. 399;

Shuey v. Holmes, 20 Wash. 13;

Shuey v. Holmes, 22 Wash. 193.

The community will be estopped to deny the husband's debt incurred for the benefit of the community and with the wife's knowledge.

McGregor v. Johnson, 58 Wash. 78. [65]

But it will not be estopped where the husband incurs the debt without the wife's knowledge and it is not in the prosecution of community business and cannot, in the ordinary course, result in any benefit to the community.

Brotton v. Langert, 1 Wash. 73;

Gund v. Parke, 15 Wash. 393;

Bird v. Steele, 74 Wash. 68 at 70;

Spinning v. Allen, 10 Wash. 570.

Another one of the indemnitors, a stockholder in the Wells Construction Company, promised to indemnify Peter Sandberg for signing the application in question. Later Peter Sandberg brought a suit to enforce this provision for indemnity. He also,

about the time he signed the application in question, became security on certain notes of the Wells Construction Company. Later, after that company got into financial difficulties, its stock was delivered to the attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save himself. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or [66] gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs.

Plaintiff is entitled to judgment against Peter Sandberg for its expenses, fixed by the stipulation at \$1,556.20 and interest thereon.

This case having been tried to the court without a jury, at the time the exemplification of the record of judgment was offered in evidence by the plaintiff and objection made, the record was admitted tenta-

tively, a final ruling being reserved. Having reached the conclusion that the objection should have been sustained, it is clear that failing to rule finally at the time of the offer, the plaintiff may have been prejudiced in that, if such ruling had then been made, plaintiff could have asked for a continuance in order to supply a legal authentication of the copy. The making of findings and final judgment herein will be delayed ten days to afford the plaintiff an opportunity to move to reopen the case for such purpose.

It is not necessary to determine whether the recital of interest in paragraph 10 of the application estops Peter Sandberg, as he is bound in any event. No right of recovery has been established against Mathilda Sandberg or the community. The debt established is that of Peter Sandberg and the community real estate is not subject to any lien on account of the judgment herein.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 31, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [67]

Requests by the Plaintiff for Findings of Fact and Conclusions of Law.

Comes now the plaintiff American Surety Company of New York, by its attorney, and pursuant to the civil procedure prescribed in the courts of the United States by the Acts of Congress, requests the Court, upon the pleadings and upon the evidence, documentary and oral, introduced in this cause to

find the facts and conclusions therefrom as follows:

Findings of Fact.

FIRST FINDING:

That on the 20th day of June, 1910, Peter Sandberg, in the regular ordinary course of business, subscribed, sealed and acknowledged the application and indemnity agreement bearing date on that day and designated herein "Plaintiff's Exhibit 2."

SECOND FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same."

THIRD FINDING:

That said application and indemnity agreement so signed by [68] Peter Sandberg contained, among other provisions, the following:

“VII. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety’s intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety’s license or right to transact business.”

FOURTH FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

“IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication, by reason of such suretyship, shall be *prima facie*

evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety."

FIFTH FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special [69] benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

SIXTH FINDING:

Peter Sandberg and Mathilda Sandberg, the defendants, were married in November, 1894, and from that time down to the present had, used, owned, or possessed no other property than community property.

SEVENTH FINDING:

That at the time Peter Sandberg signed Plaintiff's Exhibit 2, June 20, 1910, there was no other property in the possession or under the control of said Peter

Sandberg or which he then or thereafter had than the community property and estate of himself and his wife, the defendant Mathilda Sandberg, and the rents, earnings, issues and income derivable therefrom.

EIGHTH FINDING:

That on the 24th day of June, 1910, in pursuance of the application and contract of indemnity mentioned in the foregoing finding, plaintiff made, executed and delivered its standard form of contract bond with Wells Construction Company as principal and itself as surety to Powell River Paper Company, Ltd., of Vancouver, B. C., in the penal sum of twenty-five thousand dollars (\$25,000.00), and the same was received in evidence in this case and marked "Plaintiff's Exhibit 3."

NINTH FINDING:

That on the 27th day of April, 1911, Powell River Paper Company, [70] Ltd., in the Supreme Court of British Columbia, issued its writ and brought a suit against Wells Construction Company and American Surety Company of New York.

TENTH FINDING:

That on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his residence in Tacoma, Washington, and at the residence of Mathilda Sandberg in Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., giving the particulars thereof and notifying and requiring Peter Sandberg to appear and defend said suit; that neither of the defendants appeared or defended said suit.

ELEVENTH FINDING:

That thereafter such proceedings were had in said Supreme Court of British Columbia that on Monday, the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells Construction Company for thirty-one thousand six hundred thirty-two and 94/100 dollars (\$31,632.94) and against American Surety Company of New York for the amount of its said bond in the sum of twenty-five thousand dollars (\$25,000.00) and the penalty of said bond in words and figures as follows, to wit:

“And this Court doth further order and adjudge that the plaintiff do recover against the defendant Wells Construction Company the sum of \$31,632.94 for such expenditures aforesaid and against the defendant American Surety Company of New York, as surety, the sum of \$25,000.00 upon their said obligation.”

TWELFTH FINDING:

That on June 20, 1910, when the contract of indemnity, “Plaintiff’s Exhibit 2,” was signed by Peter Sandberg, the Wells [71] Construction Company was then constructing a building for Peter Sandberg and Mathilda Sandberg, his wife, under and pursuant to the terms of a contract designated herein Defendants’ Exhibit “A,” and that at said time, June 20, 1910, said building was not completed.

THIRTEENTH FINDING:

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants

from any liability under Plaintiff's Exhibit 2, and said agreement was introduced and received in evidence herein as "Plaintiff's Exhibit 10."

FOURTEENTH FINDING:

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars (\$35,000.00) then due.

FIFTEENTH FINDING:

That on November 26, 1910, Kentucky Liquor Company, with Wells Construction Company, Simon Mettler and George Vergowe made and entered into an agreement in writing as introduced in evidence herein in words and figures as follows, to wit:

This agreement, Made and entered into this 26th day of November, A. D. 1910, between the KENTUCKY LIQUOR COMPANY, a Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, George Vergowe and Carrie Vergowe, his wife, parties of the first part, and SIMON METTLER, party of the second part, WITNESSETH; Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg, and the Bank of Vancouver, a British Columbia corporation, The Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit: [72]

Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range

Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26), Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North $\frac{1}{2}$ of NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, of NW. $\frac{1}{4}$ Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg, and the Bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

The North Thirty (30) acres of the Northwest Quarter ($\frac{1}{4}$) of the Northwest Quarter ($\frac{3}{4}$) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest Quarter ($\frac{1}{4}$) of the Southwest Quarter ($\frac{1}{4}$) of the Northwest Quarter ($\frac{1}{4}$) of the same section, township and range,

—which said conveyance by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

A note for Fifty-five Thousand (\$55,000) Dollars, made by the Wells Construction Company to the said

Molsons Bank, a corporation dated at Vancouver, B. C., ———, 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said The Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; one to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; one to the City of Vancouver in the principal sum of Ten Thousand (\$10,000) Dollars; one to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand (\$3,000);

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to [73] Seventy-nine Thousand, Five Hundred Dollars (\$79,500), besides interest;

And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., a numerous other persons,

which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent;

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligation on which said Peter Sanderg is endorser, or has become liable in any manner whatever, and thereafter said Kentucky Liquor Company, trustee, shall apply by conversion, or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, for fur-

ther paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank, a corporation, and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, the Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked [74] and recorded, authorized their President and Secretary, respectively, to execute these presents and attached the corporate seals of said corporations, respectively, hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

KENTUCKY LIQUOR COMPANY, a Corporation.

By (PETER SANDBERG,) Its President.

Attest (P. H. LUCK,) Secretary.

WELLS CONSTRUCTION COMPANY, a Corporation.

By (CHARLES T. PETERSON,) Its President.

Attest (NEWTON H. PEER,) Secretary.

(GEORGE E. VERGOWE.)
(SIMON METTLER.)"

That Elmer M. Hayden thereafter became successor trustee to Kentucky Liquor Company, under

said agreement in this finding set out.

SIXTEENTH FINDING:

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

SEVENTEENTH FINDING:

That prior thereto and on the 19th day of October, 1910, agreements in writing providing for joint and several liability upon the part of Sandberg, Mettler, Vergowe and Wells were entered [75] into with Molsons Bank and the Bank of Vancouver in British Columbia, covering financial transactions and operations of the Wells Construction Company.

EIGHTEENTH FINDING:

That during all the times herein mentioned Messrs. Bates, Peer & Petersen were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Molsons Bank in the Mettler bankruptcy proceedings and for Kentucky Liquor Company and Messrs. Peterson and Peer were on November 26, 1910, President and Secretary respectively of Wells Construction Company.

NINETEENTH FINDING:

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler were defendants and

the same is in evidence in this cause as "Plaintiff's Exhibit 7," and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:

"III. That on or about said last date above referred to, to wit, the —— day of August, A. D., 1910, the defendants Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation, in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells [76] Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsement of said notes, bonds, guarantees, and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business.'" * * *

“IV. That pursuant to said agreement so entered into, plaintiff on or about the — day of August, 1910, went with the defendant, Simon Mettler to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant’s request, and in accordance with said agreement hereinbefore referred to, endorsed certain promissory notes and a guarantee in writing to the Bank of Vancouver, of Vancouver, B. C., to the amount of \$25,000; plaintiff pursuant to said agreement so made with said defendant endorsed as a surety an indemnity bond to the American Surety Company in the sum of \$10,000, to enable said defendants and said Wells Construction Company to enter into a contract with the City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of \$25,000 to enable said defendants and said Wells Construction Company to enter into a certain contract with onw Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company are yet uncompleted, and plaintiff is as yet unrelieved from the liability on account of said notes, guaranty and indemnity bonds.” * * *

“XII. That the liability of plaintiff on account of the bonds, notes and guarantees exe-

cuted by him pursuant to said agreement with the defendants Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the sum will probably exceed \$30,000, over and above the securities and indemnity already held by plaintiff.” [77]

TWENTIETH FINDING:

That Peter Sandberg paid direct certain materialmen furnishing supplies and laborers performing work, to wit, Tacoma Mill Company, to wit, one named Grosser, to wit, Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant’s Exhibit “A” entered into with Wells Construction Company.

TWENTY-FIRST FINDING:

That on the 26th day of May, 1914, in cause No. 35,986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this cause as “Plaintiff’s Exhibit 8” as follows:

“INTERROGATORY No. I.

Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case?

ANSWER TO INTERROGATORY No. I.

Yes.

INTERROGATORY No. II.

If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

ANSWER TO INTERROGATORY No. II. [78]

The Wells Construction Company started the construction of a seven-story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thousand (\$33,000.00) Dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of Thirty-five Hundred (\$3,500.00) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1,379.00, making the total contract price for said building, including extras, \$37,879.00.

INTERROGATORY No. III.

What did you ever pay the Wells Construction Company for the work done by them for you?

ANSWER TO INTERROGATORY No. III.

I paid the Wells Construction Company \$35,794.40 in cash, and paid materialmen for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days' labor at cleaning up around building at \$2.50 per day.....	\$ 100.00
Cleaning of floors in third story of the old and new building	300.00
2 Doors taken out in the old Kentucky Building	100.00
Breaking of skylight in Langlow Building adjoining	17.90
Cost of installing switches for lights in Kentucky Building	700.00
Wiring floors for bell push buttons	200.00
10 fire doors short	200.00
<hr/>	
Total,	\$1617.90

[79]

That in addition thereto defendants cancelled a

claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. * * *

INTERROGATORY No. VI.

State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced work, and the date of completion of same.

ANSWER TO INTERROGATORY No. VI.

The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. * * *

INTERROGATORY No. IX.

Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

ANSWER TO INTERROGATORY No. IX.

No, the stock was turned over to Newton H. Peer, and Charles T. Peterson under the following agreement.

In the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near

Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the Corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting [80] as far as possible his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as Trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said con-

tracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as Trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said Trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

TWENTY-SECOND FINDING:

That Peter Sandberg took over the building known as the Kentucky Building under the contract, Defendants' Exhibit "A," and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

TWENTY-THIRD FINDING:

That Peter Sandberg has not kept and performed said agreement of indemnity, "Plaintiff's Exhibit 2," or done or performed any of the things required in and by the terms of the application of the indemnity agreement aforesaid.

TWENTY-FOURTH FINDING:

That neither Wells Construction Company nor Simon Mettler nor George E. Vergowe nor Joe Wells or any of them have paid or caused to be paid or indemnified or reimbursed plaintiff against the [81] amount of the judgment and the losses accruing upon its said bond as aforesaid.

TWENTY-FIFTH FINDING:

That in and by paragraph IX of said application and indemnity agreement hereinbefore referred to and in paragraph VI thereof set out, it was agreed

and provided among other and various things that the order, judgment or adjudication by reason of such suretyship should be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement, and that said suretyship was entered into for the *the* special benefit of Peter Sandberg and the special benefit and protection of Peter Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship.

TWENTY-SIXTH FINDING:

That the plaintiff executed its bond in the sum of twenty-five thousand dollars (\$25,000.00) to Powell River Paper Company, Ltd., conditioned for the indemnifying of that company against any failure on the part of the Wells Construction Company to perform its contract.

TWENTY-SEVENTH FINDING:

Plaintiff and defendants have stipulated as to plaintiff's items of expenses incurred in defending the suit of Powell River Paper Company, Ltd., v. American Surety Company, in the Supreme Court of British Columbia, in the [82] amount of fifteen hundred fifty-six and 20/100 dollars (\$1556.20).

TWENTY-EIGHTH FINDING:

That the receivership of Wells Construction Company occurred in Tacoma in January, 1911, and in British Columbia some two months later (pp. 27 and 28).

TWENTY-NINTH FINDING:

That Peter Sandberg and the community estate managed by him consisting of the Kentucky Building and the land upon which it is situated was debtor to Wells Construction Company October 3, 1910, in the sum of \$36,547.60 (p. 53).

THIRTIETH FINDING:

That there was no statement furnished by Sandberg of moneys earned for Kentucky Building construction work under Defendants' Exhibit "A" between Wells Construction Company and Sandberg community until on or about November 29, 1910 (pp. 56 and 57).

THIRTY-FIRST FINDING:

That the Wells Construction Company after June, 1910, and to and inclusive of the month of November, 1910, and to and inclusive of the month of November, 1910, was pressed for money and was forced to procure endorsements and security for the conduct of its business and not able to pay its debts (pp. 72, 75, 76, 80, 91, 92, 129, 130, 150, 151).

THIRTY-SECOND FINDING:

That before the agreement of November 26, 1910, "Plaintiff's Exhibit 9," was executed, all of the stock of Wells Construction was transferred to Sandberg and manually delivered to Charles T. [83] Peterson and Charles T. Peterson and New-

ton Peer, of the firm of Messrs. Bates, Peer and Peterson, attorneys for both of the defendants, became President and Secretary respectively of Wells Construction Company (pp. 160, 165, 174, 185).

THIRTY-THIRD FINDING:

That on the 19th day of October, 1910, Peter Sandberg executed, subscribed and sealed a written document exhibited in this cause upon the trial (p. 168) and contained in evidence herein as "Plaintiff's Exhibit 11."

THIRTY-FOURTH FINDING:

That on the 28th day of October, 1910, Wells Construction Company brought and instituted a suit in the Superior Court of the State of Washington against Joseph Wells as evidenced by the complaint received in this cause in evidence as "Plaintiff's Exhibit 12."

THIRTY-FIFTH FINDING:

That in respect of the transactions, matters and things hereinbefore found the plaintiff in the making of its defense in the Supreme Court of British Columbia in the Dominion of Canada against Powell River Paper Company, Ltd., as aforesaid, under and pursuant to the terms of Plaintiff's Exhibit 2, laid out and expended the sum of \$1556.20 and that said Peter Sandberg agreed to repay the same under and pursuant to the terms and conditions of said indemnitor's agreement aforesaid and the same has not been repaid either by Sandberg or any one else.

THIRTY-SIXTH FINDING:

That the work which the Wells Construction Company in June [84] was doing for Peter Sand-

berg was community work and the building described in Defendant's Exhibit "A" was a community building and consisted of and became community property.

THIRTY-SEVENTH FINDING:

That there was a benefit accruing to the community from Sandberg's acts in allowing Wells Construction Company to get the bond of the American Surety Company of New York so that the Wells Construction Company might proceed with its contracts and repay to Sandberg and his wife the moneys advanced between Wells Construction Company and Sandberg and his wife for the construction of the building described in Defendants' Exhibit "A."

AND THE PLAINTIFF NOW REQUESTS THE COURT TO MAKE FROM THE FOREGOING FINDINGS OF FACT THE FOLLOWING.

Conclusions of Law.

FIRST CONCLUSION OF LAW:

That whatever proceeds were derived from the sale of property through the bankruptcy proceedings of Simon Mettler and through proceedings under the trust in Kentucky Liquor Company and Elmer Hayden, its successor trustee, proportionately reduced the liabilities of Peter Sandberg against and for which liabilities Peter Sandberg took and received the indemnities herein mentioned.

SECOND CONCLUSION OF LAW:

That Peter Sandberg, through Kentucky Liquor Company, took and received indemnity against lia-

bility for Wells Construction Company to plaintiff; that Peter Sandberg took and received indemnity from Wells Construction Company and from Simon Mettler and from George Vergowe against liability for Wells Construction Company [85] to plaintiff, and Peter Sandberg took and received indemnity from both said companies for liability to Peter Sandberg and the community estate to plaintiff for the execution of its said bond for Wells Construction Company.

THIRD CONCLUSION OF LAW:

That Simon Mettler, George Vergowe, Joseph Wells and Wells Construction Company were with Peter Sandberg joint and several obligors and indemnitors to plaintiff under the obligation of June 20, 1910, Plaintiff's Exhibit 2, and became and were bound thereby.

FOURTH CONCLUSION OF LAW:

That to establish a community debt or obligation it is not essential or necessary that profit or benefit was actually earned or received by the community. It suffices if such profit or benefit might have resulted, and things in this cause as aforesaid found done by Peter Sandberg and between him and Wells Construction Company, Kentucky Liquor Company, Simon Mettler, George Vergowe, Joseph Wells and mutually between themselves and with others in respect of liability to plaintiff herein were designed and intended for the advantage and benefit of the community and to preserve and keep the community personal property of Peter Sandberg and wife from

liabilities to plaintiff herein in those transactions incurred by Peter Sandberg.

FIFTH CONCLUSION OF LAW:

That in the matters and things done and transacted aforesaid by Peter Sandberg with the plaintiff herein, the said Peter Sandberg at all times did and transacted said matters and things in [86] the management and control of the community business and in the exercise of his powers as agent of the community estate.

SIXTH CONCLUSION OF LAW:

That the obligation or debt of indemnity, Plaintiff's Exhibit 2, was entered into by Peter Sandberg with plaintiff herein in the prosecution of the business, and affairs, and transactions, of the community estate consisting of himself and his wife with Wells Construction Company and was and is a community obligation or debt incurred for the benefit of the community.

SEVENTH CONCLUSION OF LAW:

That knowledge of and notice to Peter Sandberg and Messrs. Bates, Peer & Peterson herein was knowledge of and notice to Mathilda Sandberg; and Mathilda Sandberg, as wife of Peter Sandberg, had through them means of notice and knowledge of all the foregoing found facts herein and of all the acts herein found done by Peter Sandberg with plaintiff and others in respect thereto and Mathilda Sandberg, as the wife of Peter Sandberg, is bound thereby and estopped to assert the contrary.

EIGHTH CONCLUSION OF LAW:

That Mathilda Sandberg, wife of Peter Sandberg,

in his relations with plaintiff, was put upon inquiry by the accompanying facts and circumstances as heretofore found, and it was her duty to inquire; and she should or ought to have known of and about all the matters and things done and transacted by her husband Peter Sandberg and her attorneys Messrs. Bates, Peer & Peterson in respect thereto; but, whether she prosecuted said inquiry or acted upon said knowledge, Messrs. Bates, Peer & Peterson acted [87] in all the transactions heretofore found as attorneys for both Peter Sandberg and Mathilda Sandberg, his wife, and for the community estate.

NINTH CONCLUSION OF LAW:

That the judgment of the Supreme Court of British Columbia of Monday, the 5th day of May, 1913, and formally entered September 20, 1913, in the sum of twenty-five thousand dollars (\$25,000.00) against plaintiff herein in the cause in that said court wherein Powell River Paper Company, Ltd., was plaintiff and Wells Construction Company and American Surety Company of New York, plaintiff herein, were there defendants, is herein evidence conclusive and a bar against both Peter Sandberg and Mathilda Sandberg, his wife.

TENTH CONCLUSION OF LAW:

That plaintiff is entitled to have and recover of and from Peter Sandberg and the community estate represented by him and his said wife the said sum of twenty-five thousand dollars (\$25,000.00) and interest thereon at six per cent (6%) per annum from the 20th day of September, 1913, until paid.

ELEVENTH CONCLUSION OF LAW:

That under the terms and conditions of Plaintiff's Exhibit 2 heretofore mentioned in these findings, there was expended the sum of fifteen hundred fifty-six and 20/100 dollars (\$1556.20) in defense of the liabilities adjudicated against plaintiff by said Supreme Court of British Columbia, and Peter Sandberg thereby agreed as indemnitor to repay the same, but has not done so, nor have the same been paid, and plaintiff is entitled to have and recover of and from Peter Sandberg and the community estate represented [88] by him and his wife the said sum of fifteen hundred fifty-six and 20/100 dollars (\$1556.20) with interest thereon at the rate of six per cent (6%) per annum from September 20, 1913, until paid.

TWELFTH CONCLUSION OF LAW:

That clause X of the indemnity agreement, plaintiff's exhibit 2, by its terms precludes and estops Peter Sandberg and his wife Mathilda Sandberg from disputing or showing that the community estate, its rents, issues, profits or incomes, was or is not bound to plaintiff herein; and the terms and conditions of said clause X are conclusive and binding upon the defendants and their estate, real, personal and mixed, for plaintiff in faith thereof executed its bond and sustained the liabilities determined herein.

THIRTEENTH CONCLUSION OF LAW:

In view of all the circumstances, the business relations and operations of Sandberg in this whole matter were so dependent upon, interrelated and associated with Wells Construction Company affairs

and the affairs of the community and the doings and transactions of Sandberg with the plaintiff so involved with these relations and operations that it cannot be said that Sandberg was a mere accommodation maker or surety for Wells Construction Company. What was done by Sandberg was therefore in furtherance of the supposed business interests of the community and the liability thereon is that of the community.

All of which is found and concluded this — day of September, 1915, in our said court at Tacoma.

District Judge. [89]

And plaintiff prays that the Court may grant its requests for findings of fact and conclusions of law as aforesaid, accordingly.

W. C. BRISTOL,
Attorneys for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 21, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [90]

Order Denying Plaintiff's Requests for Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED that plaintiff's requests for Findings of Fact numbered I, VI, VII, VIII, IX, X, XI, XII, XVII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, and XXXVII, and plaintiff's

requests for Conclusions of Law numbered I, II, III, IV, V, VI, VII, VIII, IX and XII, and each of them be, and the same are hereby denied.

IT IS FURTHER ORDERED that defendants' requests for Findings of Fact numbered II, V, VI, VII, VIII and XIII, and defendants' request for Conclusions of Law numbered I, and each of them be, and the same are hereby denied.

ORDERED this 22d day of October, 1915.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [91]

**Defendants' Requested Findings of Fact and
Conclusions of Law.**

Comes now defendant Mathilda Sandberg separately and in her own behalf, and the defendants Peter Sandberg and Mathilda Sandberg, his wife, as a community, and request the Court to make the following Findings of Fact and Conclusions of Law herein.

FINDINGS OF FACT.

I.

That on or about the 20th day of June, 1910, the defendant Peter Sandberg subscribed and acknowledged that certain application or indemnity agreement bearing date on that date to plaintiff, which said application or indemnity agreement was intro-

duced in evidence herein and marked "Plaintiff's Exhibit No. 2."

That defendant Mathilda Sandberg had no knowledge of the subscribing and acknowledgment of said agreement by defendant Peter Sandberg until the institution of this action in this Court, to wit, on or about the 26th day of June, 1914.

II.

That said application or indemnity agreement so signed and acknowledged by defendant Peter Sandberg, contained among other provisions the following:

"IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be [92] required to pay the same."

"VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety to prosecute or defend or take part

in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business.

“IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.”

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which

the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

III.

That defendants Peter Sandberg and Mathilda Sandberg were married at Tacoma, Washington, in November, 1894, and ever since said time have been and now are husband and wife, and during all of said time have lived together as such, and said defendants are the owners of certain real property in the Counties of Pierce and King, in the State of Washington, more particularly described, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

[93]

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along

the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112, Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638, Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West $\frac{1}{2}$ of S. E. $\frac{1}{4}$ less $1\frac{38}{100}$ acres, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Section 8, Township 8, Range 5 East, Pierce County.

West half of Section 2, Township 20, Range 7 King County, Washington.

North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Section 12, Township 20,

Range 7, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East $\frac{1}{2}$ of Southeast $\frac{1}{4}$, Section 10, Township 20, Range 8, King County, Washington.

All of which said property was acquired by defendants after their marriage, and by their joint efforts, and not by gift, bequest or inheritance.

IV.

That at the time of their marriage defendant Peter Sandberg had no property, except a small house on a lot situated at about South 25th and I Streets, in the city of Tacoma, which house [94] and lot were worth not to exceed one thousand dollars, and were incumbered by a mortgage of six hundred dollars. That said house, after the marriage of said defendants, was sold, and the funds derived from such sale were used and expended by defendant Peter Sandberg without any separate account of the same being kept.

V.

That on or about the 24th day of June, 1910, in pursuance of said application, or indemnity agreement "Plaintiff's Exhibit No. 2," hereinabove referred to, plaintiff made, executed and delivered its certain bond with the Wells Construction Company, a corporation, as principal, and itself as surety, to Powell River Paper Company, Ltd., of Vancouver, B. C., which said bond was in the penal sum of twenty-five thousand dollars, a copy of the same

being received in evidence herein and marked, "Plaintiff's Exhibit No. 3."

VI.

That on or about the 27th day of April, 1911, the Powell River Paper Company, Ltd., in the Supreme Court of British Columbia issued its writ and brought a suit against the Wells Construction Company and against plaintiff American Surety Company, and on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his place of business, 1128 Pacific Avenue, Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., which notice, together with a proof of service thereon was introduced in evidence herein marked "Plaintiff's Exhibit No. 4." That defendant Mathilda Sandberg had no knowledge or notice thereof, or of the pendency of said action, and defendant Peter Sandberg did not appear or defend the same.

That thereafter such proceedings were had in the Supreme Court of British Columbia that on the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells [95] Construction Company for thirty-one thousand six hundred and thirty-two and 94/100 (\$31,632.94) dollars, and against the American Surety Company, plaintiff, for the amount of its said bond, to wit, the sum of twenty-five thousand (\$25,000) dollars.

VII.

That plaintiff incurred certain items of expense in defending said suit stipulated by plaintiff and defendants herein to be the sum of fifteen hundred and

fifty-six and 20/100 (\$1556.20) dollars.

VIII.

That neither of the defendants Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company, and that defendant Peter Sandberg signed the application or indemnity agreement, Plaintiff's Exhibit No. 2, at the request of and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application.

That at the time defendant Peter Sandberg signed said application the Wells Construction Company was constructing a building for defendants, the contract price for which building, together with extras was thirty-six thousand five hundred dollars, on which the defendants had prior to June 20th, 1910, paid the sum of thirty-six thousand three hundred eighty-three and 05/100 (\$36,383.05) dollars. That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells Construction Company, in the matter of the [96] construction of said building and the signing

of said indemnity agreement, "Plaintiff's Exhibit No. 2."

That at said time the Wells Construction Company was in good and substantial beneficial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.

IX.

That on June 20th, 1910, the Wells Construction Company, Simon Mettler, and George Vergowe, executed to defendant Peter Sandberg an indemnity agreement introduced in evidence herein as Plaintiff's "Exhibit No. 10." That on November 26th, 1910, the Kentucky Liquor Company, the Wells Construction Company, Simon Mettler and George Vergowe, made and entered into an agreement introduced in evidence herein, marked "Plaintiff's Exhibit No. —," which said agreements were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife Mathilda Sandberg, for the purpose of saving defendant Peter Sandberg harmless on account of liability he had incurred on account of the Wells Construction Company, because of the matters and things referred to in said agreements, but that said agreements, or either of them, were not for the benefit, or gain, or in the interest of the community consisting of defendants, or for the use, benefit or interest of the defendant Mathilda Sandberg.

X.

That since the filing of the opinion herein by the Court, the plaintiff has moved to reopen the cause for

the purpose of submitting a proper exemplification of the record of the judgment of the Courts of British Columbia referred to in the Court's opinion in accordance therewith, and has supplied the record with an authenticated copy, which defendants concede to be in compliance with the law. [97]

XI.

That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that *that*

the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination [98] of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer, and Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

XII.

That defendant Peter Sandberg has not kept and performed the agreement of indemnity, "Plaintiff's Exhibit No. 2," nor any of the things required by the terms and conditions thereof, and that the Wells Construction Company, nor Simon Mettler, nor George E. Vergowe, nor Joseph Wells, or any of them have paid, or caused to be paid, or indemnified or reim-

bursed plaintiff against the amount of the judgment and the losses accruing on said bond.

XIII.

That the Wells Construction Company became insolvent and went into the hands of a receiver in January, 1911.

XIV.

That defendant Peter Sandberg without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guaranties to banks in British Columbia, referred to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guaranties so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guaranties, and in signing and entering into the several agreements referred to in the testimony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guaranties and other agreements, excepting said [99] contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the

transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as trustee, the Kentucky Liquor Co., the Molsons Bank, and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction Co., was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the indemnity agreement sued on herein, "Plaintiff's Exhibit No. 2," and that said building contract, and the relationship of the parties thereto was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was en-

tirely independent thereof, and was not spoken [100] of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building contract was not a consideration, and was not regarded as a consideration for any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to.

From the foregoing Findings of Fact, the Court makes the following.

CONCLUSIONS OF LAW.

I.

That plaintiff is entitled to a judgment against defendant Peter Sandberg in the sum of twenty-six thousand five hundred and fifty-six and 20/100 dollars, (\$26,556.20) *dollars*, together with interest thereon at the rate of 6% per annum, from the 20th day of September, 1915.

II.

That plaintiff's action should be dismissed as to defendant Mathilda Sandberg.

III.

That said judgment should provide that it is a separate debt of defendant Peter Sandberg, and not a debt, liability or obligation of defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real

property of defendants hereinabove specifically set forth.

Let a judgment be entered accordingly.

By the Court,

Judge. [101]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 11, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [102]

Findings of Fact and Conclusions of Law.

The Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I.

That on or about the 20th day of June, 1910, the defendant Peter Sandberg subscribed and acknowledged that certain application or indemnity agreement bearing date on that date to plaintiff, which said application or indemnity agreement was introduced in evidence herein and marked "Plaintiff's Exhibit No. 2."

II.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from

and against every claim, demand, liability, cost, charge, counsel fee, (including fees of special counsel whenever by the Surety deemed necessary), expense, suit order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same."

III.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom or from its said suretyship. [103] The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the

surety's license or right to transact business."

IV.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety."

V.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substan-

tially and beneficially interested in the award and performance of such contract and obtaining such suretyship.”

VI.

That defendant Mathilda Sandberg had no knowledge of the subscribing and acknowledgment of said agreement by defendant Peter Sandberg until the institution of this action in this court, to wit, on or about the 26th day of June, 1914.

VII.

That defendants Peter Sandberg and Mathilda Sandberg were married at Tacoma, Washington, in November, 1894, and ever since said time have been and now are husband and wife, and during all of said time have lived together as such, and said defendants are the [104] owners of certain real property in the Counties of Pierce and King, in the State of Washington, more particularly described as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8 in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, “Map of New Tacoma Washington Territory,” which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North Line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73

degrees, 50 minutes 02 seconds with the last-described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes, 02 seconds with the last-described course 173.510 feet; thence Southerly along a line at right angles with the last-described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12 Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West $\frac{1}{2}$ of S. E. $\frac{1}{4}$ less 1-38/100 acres and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Section 12, Township 20, Range 7, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Section 12, Township 20, Range 7, King County, Washington;

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East $\frac{1}{2}$ of Southeast $\frac{1}{4}$, Section 10, Township 20, Range 8, King County, Washington. [105]

All of which said property was acquired by defendants after their marriage, and by their joint efforts, and not by gift, bequest or inheritance.

VIII.

That at the time of their marriage defendant Peter Sandberg had no property, except a small house on a lot situated at about South 25th and I Streets, in the city of *of* Tacoma, which house and lot were worth not to exceed one thousand dollars, and were incumbered by a mortgage of six hundred dollars. That said house, after the marriage of said defendants, was sold, and the funds derived from such sale were used and expended by defendant Peter Sandberg without any separate account of the same being kept.

IX.

That on or about the 27th day of April, 1911, the Powell River Paper Company, Ltd., in the Supreme Court of British Columbia issued its writ and brought a suit against the Wells Construction Company and against plaintiff American Surety Company, and on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his place of business, 1128 Pacific Avenue, Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., which notice, together with a proof of service thereon was introduced in evidence herein, marked "Plaintiff's Exhibit No. 4." That defendant Mathilda Sandberg

had no knowledge or notice thereof, or of the pendency of said action, and defendant Peter Sandberg did not appear or defend the same.

That thereafter such proceedings were had in the Supreme Court of British Columbia that on the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells Construction Company for thirty-one thousand, six hundred and thirty-two and 94/100 dollars (\$31,632.94) *dollars*, and against the American [106] Surety Company, plaintiff, for the amount of its said bond, to wit, the sum of twenty-five thousand dollars (\$25,000).

X.

That since the filing of the opinion herein by the Court, the plaintiff has moved to reopen the cause for the purpose of submitting a proper exemplification of the record of the judgment of the Courts of British Columbia referred to in the Court's opinion in accordance therewith, and has supplied the record with an authenticated copy, which defendants concede to be in compliance with the law.

XI.

That on June 20, 1910, when the contract of indemnity, "Plaintiff's Exhibit 2," was signed by Peter Sandberg, the Wells Construction Company was then constructing a building for Peter Sandberg and Mathilda Sandberg, his wife,—carrying on a business as the "Kentucky Liquor Company"—under and pursuant to the terms of a contract designated herein Defendants' Exhibit "A," and that at said time, June 20, 1910, said building was not completed.

XII.

That neither of the defendants, Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company, and that defendant Peter Sandberg signed the application or indemnity agreement, Plaintiff's Exhibit No. 2, at the request of, and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application.

That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the [107] building mentioned in the preceding finding, for defendants, the contract price for which building, together with extras, was thirty-six thousand, five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand, three hundred, eighty-three and 05/100 dollars (\$36,383.05). That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells Construction Company, in the matter of the construction of said building and the signing of said

indemnity agreement, "Plaintiff's Exhibit No. 2."

That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.

XIII.

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants from any liability under "Plaintiff's Exhibit 2," and said agreement was introduced and received in evidence herein as "Plaintiff's Exhibit 10."

XIV.

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars (\$35,000) then due.

XV.

That on November 26, 1910, Kentucky Liquor Company with Wells Construction Company, Simon Mettler and George Vergowe made and entered into an agreement in writing as introduced in evidence herein in words and figures as follows, to wit: [108]

"THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, a Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife,

parties of the first part, and SIMON METTLER, party of the second part,

“WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia corporation, and the Molsons Bank, a British Columbia corporation both of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

“Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26), Block 8150 Indian Addition; Lots Nineteen (19) to Twenty-six, Block 8249, Indian Addition; North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Section 14, Township 20, Range 3 E.

“And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

“The North Thirty (30) acres of the Northwest quarter of the Northwest quarter of Section Thirteen

(13), Township Twenty (20), Range Three (3) East; also the Northwest Quarter of the Southwest quarter of the Northwest quarter of the same section, township and range.

—which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

“A note for the sum of Twenty-five Thousand (\$25,000) Dollars, made by the Wells Construction Company to said Bank of Vancouver dated at Vancouver, B. C., ———, 1910, due ninety days after date;

“A note for Fifty-five Thousand (\$55,000) Dollars, made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C. ———, 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said The Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows: [109]

“One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand Dollars (\$10,000); One to the Pacific Investment

Company, Ltd., in the principal sum of Three Thousand (\$3,000) Dollars;

“And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand, Five Hundred Dollars (\$79,500), besides interest.

“And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

“And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent,

“And Whereas, said Simon Mettler is desirous of withdrawing from said corporation and relieving the same from liability on account of the indebtedness owing him, from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

“IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title

to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

“That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, trustee, shall apply by conversion, or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

“IN WITNESS WHEREOF, The Wells Construction Company, a [110] corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their President and Secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively, hereto.

“IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Wash-

ington, this 26th day of November, A. D. 1910.

“KENTUCKY LIQUOR COMPANY, a Corporation,

By (PETER SANDBERG),

Its President.

Attest (P. H. LUCK),

Secretary.

WELLS CONSTRUCTION COMPANY, a Corporation,

By (CHARLES T. PETERSON),

Its President.

Attest (NEWTON H. PEER),

Secretary.

(GEORGE E. VERGOWE).

(SIMON METTLER.)”

XVI.

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

XVII.

That Peter Sandberg paid direct certain materialmen furnishing supplies and laborers performing work, to wit, Tacoma Mill Company, to wit, one named Grosser, to wit one named Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit “A” entered into with Wells Construction Company.

XVIII.

That Peter Sandberg took over the building known

as the [111] Kentucky Building under the contract Defendants' Exhibit "A," and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

XIX.

That the work which the Wells Construction Company was doing in June for Peter Sandberg was community work and the building described in Defendants' Exhibit "A" was a community building and consisted of and became community property.

XX.

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler, were defendants and the same is in evidence in this cause as "Plaintiff's Exhibit 7" and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:

"III. That on or about said last date above referred to, to wit, the —— day of August, A. D. 1910, the defendants Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were inter-

ested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business. * * *

“IV. That pursuant to said agreement so entered into, plaintiff on or about the — day of August, 1910, went with the defendant Simon Mettler to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant’s [112] request, and in accordance with said agreement hereinabove referred to, endorsed certain promissory notes and a guarantee in writing to The Bank of Vancouver, of Vancouver, B. C., to the amount of Twenty-five Thousand (\$25,000) Dollars, and plaintiff pursuant to said agreement so made with said defendants endorsed as a surety an indemnity bond to the American Surety Company in the sum of Ten Thousand (\$10,000) Dol-

lars, to enable said defendants and said Wells Construction Company to enter into a contract with the said City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of Twenty-five Thousand (\$25,000) Dollars to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company, are yet uncompleted and plaintiff is as yet unrelieved from the liability on account of said notes, guarantee and indemnity bonds. * * *

“XII. That the liability of plaintiff on account of the bonds, notes and guarantees executed by him pursuant to said agreement with the defendants Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for sometime in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the same will probably exceed Thirty Thousand (\$30,000) Dollars, over and above the securities and indemnity already held by plaintiff.”

XXI.

That on the 26th day of May, 1914, in cause No. 35986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons

Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this cause as "Plaintiff's Exhibit No. 8" as follows, to wit:

"INTERROGATORY No. I.

"Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case? [113]

"ANSWER TO INTERROGATORY No. I.

"Yes.

"INTERROGATORY No. II.

"If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

"ANSWER TO INTERROGATORY No. II.

"The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thou-

sand (\$33,000) Dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of Thirty-Five Hundred (\$3500) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1379, making the total contract price for said building, including extras \$37,879.00.

“INTERROGATORY No. III.

“What did you every pay the Wells Construction Company for the work done by them for you?

“ANSWER TO INTERROGATORY No. III.

“I paid the Wells Construction Company \$35,794.-40 in cash, and paid material-men for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

“That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around	
building, at \$2.50 per day	\$100.00
Cleaning of floors in third story of	
the old and new building	300.00

2 Doors taken out in the old Ken- tucky Building	100.00
Breaking of skylight in Langlow Building adjoining	17.90
Cost of installing switches for lights in Kentucky Building....	700.00

[114]

Wiring floors for bell push-buttons	200.00
10 fire doors short	200.00

Total, \$1,617.90

“That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. * * *

“INTERROGATORY No. VI.

“State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and the date of the completion of same.

“ANSWER TO INTERROGATORY No. VI.

“The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. * * *

“INTERROGATORY No. IX.

“Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

“ANSWER TO INTERROGATORY No. IX.

“No, the stock was turned over to Newton H. Peer and Charles T. Peterson under the following agreement:

“In the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the Corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, [115] as Trustees, for the use and benefit of

said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as Trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson as said Trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

XXII.

That on June 20, 1910, the Wells Construction Company, Simon Mettler and George Vergowe, executed to defendant Peter Sandberg an indemnity agreement introduced in evidence herein as "Plaintiff's Exhibit No. 10." That on November 26th, 1910, the Kentucky Liquor Company, the Wells Construction Company, Simon Mettler and George Vergowe, made and entered into an agreement introduced in evidence herein, marked "Plaintiff's Ex-

hibit No. —,” which said agreements were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife Mathilda Sandberg, for the purpose of saving defendant Peter Sandberg harmless on account of liability he had incurred on account of the Wells Construction Company, because of the matters and things referred to in said agreements, but that said agreements, or either of them were not for the benefit, or gain, or in the interest of the community consisting of defendants, or for the use, benefit or interest of the defendant Mathilda Sandberg.

XXIII.

That defendant Peter Sandberg, without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guaranties to banks in British Columbia, referred [116] to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guaranties so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guaranties, and in signing and entering into the several agreements referred to in the testimony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guaranties and other agreements, excepting said contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to

Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as Trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as Trustee, the Kentucky Liquor Co., the Molsons Bank, and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the [117] carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction Company was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the in-

demnity agreement sued on herein, "Plaintiff's Exhibit No. 2," and that said building contract, and the relationship of the parties thereto was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was entirely independent thereof, and was not spoken of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building Contract was not a consideration, and was not regarded as a consideration of any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to.

XXIV.

That during all the times herein mentioned Messrs. Bates, Peer & Peterson were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Kentucky Liquor Company, and Messrs. Peterson and Peer were on November 26, 1910, president and secretary, respectively, of Wells Construction Company.

XXV.

That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at [118] Van-

couver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting, as far as possible, his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct.

That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and [119] Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson, as said trustees, carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

XXVI.

That defendant Peter Sandberg has not kept and performed the agreement of indemnity "Plaintiff's Exhibit No. 2," nor any of the things required by the terms and conditions thereof, and that the Wells Construction Company, nor Simon Mettler, nor George E. Vergowe, nor Joseph Wells, nor any of them have paid, or caused to be paid, or indemnified or reimbursed plaintiff against the amount of the judgment and the losses accruing on said bond.

XXVII.

Plaintiff and defendants have stipulated as to plaintiff's items of expenses incurred in defending the suit of the Powell River Paper Company, Ltd., v. American Surety Company, in the Supreme Court of British Columbia, in the amount of fifteen hundred, fifty-six and 20/100 dollars (\$1556.20).

XXVIII.

That in respect to the transactions, matters and things hereinbefore found the plaintiff, in the mak-

ing of its defense in the Supreme Court of British Columbia in the Dominion of Canada against the Powell River Paper Company, Ltd., as aforesaid, under and pursuant to the terms of Plaintiff's Exhibit No. 2, laid out and expended the sum of fifteen hundred, fifty-six and 20/100 dollars and that said Peter Sandberg agreed to repay the same under and pursuant to the terms and conditions of said indemnitor's agreement aforesaid and the same has not been repaid, either by Sandberg or anyone else.

From the foregoing Findings of Fact, the Court makes the following: [120]

CONCLUSIONS OF LAW.

I.

That plaintiff is entitled to have and recover of, and from Peter Sandberg the sum of twenty-five thousand dollars (\$25,000) and interest thereon at six per cent (6%) per annum from the 20th day of September, 1913, until paid.

II.

That, under the terms and conditions of "Plaintiff's Exhibit No. 2," heretofore mentioned in these findings, there was expended the sum of fifteen hundred, fifty-six and 20/100 dollars (\$1556.20) in defense of the liabilities adjudicated against plaintiff by said Supreme Court of British Columbia, and Peter Sandberg thereby agreed, as indemnitor, to repay the same, but has not done so, nor have the same been paid, and plaintiff is entitled to have and recover of and from Peter Sandberg the said sum of fifteen hundred, fifty-six and 20/100 dollars (\$1556.20) with interest thereon at the rate of six

per cent (6%) per annum from September 20, 1913, until paid.

III

That plaintiff's action should be dismissed as to defendant Mathilda Sandberg.

IV.

That said judgment should provide that it is a separate debt of defendant Peter Sandberg, and not a debt, liability or obligation of defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real property of defendants hereinabove specifically set forth.

Let judgment be entered accordingly.

Dated: October 22, 1915.

EDWARD E. CUSHMAN,

Judge. [121]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [122]

**Exceptions of Plaintiffs to Findings of Fact and
Conclusions of Law Made Herein October 22,
1915.**

Comes now American Surety Company of New York, above-named plaintiff, and presents these its exceptions and objections by its attorney to the action of the Court in making its findings of fact and

conclusions of law herein in October 22, 1915, as the said Court did, to wit:

FIRST EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find the facts as in the first finding of fact requested by the plaintiff and to the modification thereof by the Court and to the failure of the Court to find thereon in accordance with the evidence.

SECOND EXCEPTION:

Plaintiff excepts to the action of the Court in failing and refusing to find the facts as requested in the sixth to the twelfth findings of facts by the plaintiff, all inclusive, and in failing and refusing to find the facts as requested therein and to any modification of the same made by the Court and to the failure of the Court to find facts shown by the evidence as requested by plaintiff in said requested findings.

THIRD EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find as in the seventeenth finding of fact requested by plaintiff and to the failure of the Court to make any finding the equivalent thereof from the evidence and to the Court's modification thereof by the findings of fact it did make. [123]

FOURTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find as in the twenty-third to the thirty-fourth findings of fact requested by the plaintiff, all inclusive, and to the modifications by the Court thereof and to the failure and refusal of the Court to find facts the equivalent thereof as shown by the evidence.

FIFTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find the fact as set forth in the thirty-seventh finding of fact requested by plaintiff and to its failure and refusal to find any fact the equivalent thereof as shown by the evidence.

SIXTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to grant and make the first to the ninth, all inclusive, conclusions of law requested by plaintiff and to the failure of the Court to find conclusions of law from the facts the equivalent thereof and to the modification by the Court of the conclusions of law so made and requested by the plaintiff.

SEVENTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find the twelfth conclusion of law as requested by plaintiff.

EIGHTH EXCEPTION:

Plaintiff excepts to the order entered on the 22d day of October, 1915, wherein the findings therein named and herein excepted to were denied and wherein the conclusions herein excepted to were denied by the Court when it made its findings of fact and conclusions of law which the Court did render and file. [124]

NINTH EXCEPTION:

Plaintiff excepts to finding of fact numbered I as made by the Court for the reason that it eliminates as part thereof that Peter Sandberg did the things specified "in the regular ordinary course of business."

TENTH EXCEPTION:

Plaintiff excepts to the action of the Court in making finding of fact numbered VI because the same is against the evidence and against the admitted knowledge of her means of inquiry and the actual knowledge of her attorneys, Messrs. Bates, Peer & Peterson.

ELEVENTH EXCEPTION:

Plaintiff excepts to the finding of fact numbered IX wherein it is found that the notice of the 17th of May, 1911, was served upon Peter Sandberg "at his place of business," whereas the evidence shows and the notice itself in evidence with proof of service attached thereto exhibits, that upon that date there was served upon Peter Sandberg as his residence and at the residence of Mathilda Sandberg in Tacoma, a notice as specified in said finding, which is Plaintiff's Exhibit 4, and that said finding IX is against the evidence for that Mathilda Sandberg had means of knowledge and her attorneys, Messrs. Bates, Peer & Peterson, knew of all the matters and things contained in said notice.

TWELFTH EXCEPTION:

Plaintiff excepts to the finding of fact numbered XII and to the whole thereof because it is an argumentative interpretation of the evidence and not a finding of fact and is against the law and against the evidence. [125]

THIRTEENTH EXCEPTION:

Plaintiff excepts to finding of fact numbered XXII as made by the Court for the reason that it is not a finding of fact but a conclusion of law and

so far as it undertakes or purports to be a finding of fact it asserts and pretends to find that the agreements therein referred to were made without the knowledge, consent or acquiescence of the defendant Mathilda Sandberg, which part of said finding is against the evidence and against the law and upon a matter which could not be put in issue by the pleading.

FOURTEENTH EXCEPTION:

Plaintiff excepts to finding of fact numbered XXIII as made by the Court for the reason that the same is not a finding of fact but an argumentative interpretation of the fact and a conclusion of law not supported by the evidence and against the evidence.

FIFTEENTH EXCEPTION:

Plaintiff excepts to conclusion of law numbered III as made by the Court for the reason that said conclusion of law does not follow from the facts found and is against the evidence on the whole record and against the law.

SIXTEENTH EXCEPTION:

Plaintiff excepts to the conclusion of law IV as made by the Court for the reason that said conclusion of law does not follow from the facts found and is against the evidence on the whole record and against the law.

W. C. BRISTOL,

Attorney for Plaintiff. [126]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 1, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [127]

Journal Order Extending Time to File Bill of Exceptions and Overruling Plaintiff's Exceptions to Findings of Fact and Conclusions of Law.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 13th day of June, A. D. 1916, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW
YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the exceptions of plaintiff to findings of fact and conclusions of law be and the same are overruled and exception is allowed, and plaintiff is allowed 90 days in which to file its bill of exceptions. [128]

Judgment.

This cause came on to be heard at the July term of the above-entitled court, and was argued by counsel for the respective parties, and thereupon and upon consideration thereof the Court made and filed herein on the 31st day of July, 1915, its decision in writing, and thereafter, and on the 22 day of Octo-

ber, 1915, made and filed its Findings of Fact and Conclusions of Law in writing, wherein and whereby it found and determined all of the facts herein, it is now therefore in accordance with said decision and Findings of Fact and Conclusions of Law as aforesaid,—

ORDERED, ADJUDGED AND DECREED that plaintiff, American Surety Company, of New York, a corporation, do have and recover of defendant Peter Sandberg, judgment in the sum of twenty-six thousand five hundred and fifty-six and 20/100 (\$26,556.20) dollars, together with interest thereon at the rate of 6% per annum from the 20th day of September, 1913, until paid, together with the costs of this action to be taxed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said action be and the same is hereby dismissed as against defendant Mathilda Sandberg, and as against the community consisting of Mathilda Sandberg and her husband, Peter Sandberg.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following described real property situated in the counties of King and Pierce, State of Washington, is the community real property of the defendants Peter Sandberg and Mathilda Sandberg, his wife, to wit:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303; in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Terri-

tory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Beginning at the intersection of the North line of Lower [129] Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence West-erly along a line at right angles to the line last de-scribed 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line mak-ing an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Com-pany's Addition;

Lots 11 and 12, Block 7638 Tacoma Land Com-pany's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom,

Pierce County, Washington;

West $\frac{1}{2}$ of S. E. $\frac{1}{4}$, less 1 $\frac{38}{100}$ acres, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Section 12, Township 20, Range 7, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Section 12, Township 20, Range 7, King County, Washington;

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East $\frac{1}{2}$ of Southeast $\frac{1}{4}$, Section 10, Township 20, Range 8, King County, Washington;

All of which said property was acquired after the marriage of the defendant Mathilda Sandberg to her codefendant Peter Sandberg, and by their joint efforts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the judgment herein entered against defendant Peter Sandberg is not, and does not constitute a lien, encumbrance or cloud upon the title to said real property above described, or any part thereof, or upon any of the community real property owned by the defendants [130] herein, and it is further ordered, adjudged and decreed that said real property above described, or no part thereof shall be levied upon or sold to satisfy the judgment entered herein, or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that defendant Mathilda Sandberg have and recover judgment against plaintiff

vs. Peter Sandberg and Matilda Sandberg. 167

for her costs and disbursements herein to be taxed.

Dated, this 13th day of June, A. D. 1916.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist.
of Washington, Southern Division. Jun. 13, 1916.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [131]

**Order Extending Time to Prepare, etc., Bill of Ex-
ceptions Sixty Days from September 11, 1916.**

At a regular session of the United States District
Court for the Western District of Washington,
Southern Division, held at Tacoma on the 14th day
of August, A. D. 1916, the Honorable Edward E.
Cushman, United States District Judge, presiding,
among other proceedings had were the following,
truly taken and correctly copied from the journal
of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW
YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the time to prepare and pre-
sent bill of exceptions in this case is extended sixty
days from Sept. 11, 1916. [132]

Order Extending Time to Settle, etc., Bill of Exceptions Sixty Days from November 11, 1916.

This cause being further heard and it appearing that the bill of exceptions has been prepared and filed within the time heretofore allowed by the Court, but that there are pending negotiations between respective counsel to settle said bill, now upon consideration of the Court, it is

ORDERED, that the plaintiff may have an additional period of sixty (60) days from and after November 11, 1916, within which to settle said bill of exceptions and present the same to the Court for signature.

Dated October 28, 1916.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 28, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [133]

Order Extending Time for Settlement of Bill of Exceptions to January 12, 1917.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 5th day of January, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW
YORK,

vs.

PETER SANDBERG et ux.

Upon consent of attorneys for both sides, it is now ordered that the time for settlement of the bill of exceptions herein be extended to January 12, 1917, at ten o'clock A. M. [134]

**Order Extending Time to Settle Bill of Exceptions,
etc., to March 6, 1917.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 11th day of January, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW
YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the time within which to settle the bill of exceptions in the above case be, and it is hereby extended from January 12, 1917, to March 6, 1917, on account of illness of one of the attorneys for defendants. [135]

Order Extending Time to Settle Bill of Exceptions.

It is by the Court ordered that the July, 1916, term of this court be, and the same is hereby extended for a period of ten days from the date hereof, for the purpose of settling the bill of exceptions in the above-entitled cause.

By the Court, this 5th day of February, 1917.

EDWARD E. CUSHMAN,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 5, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [136]

Bill of Exceptions as Settled and Certified.

For the purpose of making those matters and things that occurred upon the trial of this cause of record herein, it is certified that on the 4th day of June, 1915, the above-entitled cause came on duly and regularly for hearing in the above-entitled court before Honorable E. E. Cushman, Judge of said court, and there and then the defendants appeared in person and by their attorneys, Messrs. Bates, Peer & Peterson, and the plaintiff by its attorneys and solicitors of record, and the cause was tried before the Court sitting as a jury pursuant to stipulation of the parties, and after the opening statements of respective counsel the plaintiff offered in evidence Exhibit No. 1, and application signed by the Wells Construction Company and Joseph Wells to the plaintiff, American Surety Company of New York,

for a bond of indemnity upon a contract with Powell River Paper Company, Ltd., this being the application alleged in the complaint as rejected by the plaintiff because of insufficient indemnity.

The community of Sandberg and wife, Mathilda Sandberg, objected to the offer of Exhibit 1, on the grounds that it was not signed by either of them, and was not binding upon them, and for want of preliminary proof thereon as to its authenticity, which objection was overruled.

Thereupon plaintiff offered in evidence Plaintiff's Exhibit No 2, which is the application set forth in the complaint of defendant, Mathilda Sandberg, in her own behalf and in behalf of [137] the community of Sandberg and wife, objected to said offer on the grounds that it was incompetent, irrelevant and immaterial, and did not tend to prove any issue in so far as she and the community were concerned, which objection was, by the Court, overruled. A copy of said application constitutes pages 21½ of this record.

Thereupon there was introduced in evidence, the bond described in the complaint, and the same was received and marked Plaintiff's Exhibit No. 3, being a document obligating American Surety Company as surety to Powell River Paper Co., Ltd., in the sum of twenty-five thousand (\$25,000) dollars being the bond referred to in the complaint to which defendant Matilda Sandberg, in her own behalf and in behalf of the Sandberg community, made the same objection as was made to Exhibit No. 2, which

was overruled, and the same was received in evidence.

Thereupon there was offered in evidence Plaintiff's Exhibit No. 4, consisting of the notice alleged in the complaint served upon Wells Construction Company, Simon Mettler, George E. Vergowe, Peter Sandberg and Joseph Wells, to which defendant, Matilda Sandberg, and the Sandberg community made the same objection as was made to Exhibit 2, and the same was received and considered in evidence.

Thereupon there was offered and received in evidence Plaintiff's Exhibit No. 5, consisting of the certified copy of the judgment in the Supreme Court of British Columbia in the case of Powell River Paper Company, Ltd., plaintiff, against Wells Construction Company and American Surety Company of New York, defendants, to which defendant, Matilda Sandberg and the Sandberg community, made the same objection as was made to Exhibit No. 2. [138]

Thereupon there was offered a stipulation between counsel comprising the amount of expenses and outlays incurred by American Surety Company fixed at the sum of \$1556.20, the defendants reserving the right to contest any liability, however, as to said item.

There was thereupon offered in evidence, a certified copy of the complaint in the Superior Court of the State of Washington in cause numbered 30878, wherein Peter Sandberg was plaintiff and Simon Mettler and others defendants, and the same was

marked Plaintiff's Exhibit No. 7, to which defendant, Matilda Sandberg and the Sandberg community, made the same objection as was made to Exhibit No. 2.

Whereupon the Court stated, "the objection will be overruled. These objections being general, not specific, nothing is called to the attention of the Court but admissions in the pleadings of one lawsuit claimed to be against the pleadings in another lawsuit will, in many cases have very little weight because the party in his pleadings always takes extreme positions." Whereupon said paper was admitted in evidence.

Thereupon there was offered and introduced in evidence a certified copy of the interrogatories and answers thereto in the Superior Court of the State of Washington, in and for Pierce County, in cause numbered 35986, wherein the Molson's Bank was plaintiff and Peter Sandberg and Matilda Sandberg, his wife, were defendant, which interrogatories were verified by defendant Peter Sandberg alone, and were not verified by Matilda Sandberg, and wherein the defendants Peter Sandberg and Mathilda Sandberg, his wife, made answers to said interrogatories, all of which were contained in a certified document then offered in evidence by the plaintiff, to which defendant Mathilda Sandberg, and the Sandberg community, made the same objection as was made to [139] Exhibit No. 2, which objection was overruled, and the same was received in evidence and marked Plaintiff's Exhibit No. 8, and there was there and then offered and read to

the Court the interrogatories and answers as follows, to wit:

INTERROGATORY No. I.

Did the Wells Construction Company do any work for you, or either of you, at any time before the execution of the note sued on in this case?

ANSWER TO INTERROGATORY No. I.

Yes.

INTERROGATORY No. II.

If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

ANSWER TO INTERROGATORY No. II.

The Wells Construction Company started the construction of a seven-story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the city of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was thirty-three thousand (\$33,000) dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of thirty-five hundred (\$3500) dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra

painting, amounting in all to \$1379, making the total contract price for said building, including [140] extras \$37,879.

INTERROGATORY No. III.

What did you ever pay the Wells Construction Company for the work done by them for you?

ANSWER TO INTERROGATORY No. III.

I paid the Wells Construction Company \$25,794.40 in cash, and paid materialmen for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around building, at \$2.50 per day.....	\$ 100.00
Cleaning of floors in third story of the old and new building.....	300.00
2 doors taken out in the old <i>Dentucky</i> building	100.00
Breaking of skylight in Langlow Building, adjoining	17.90
Cost of installing switches for lights in <i>Kentucky</i> Building	700.00
Wiring floors for bell push buttons.....	200.00
10 Fire doors short.....	200.00
<hr/>	
Total.....	\$1617.90

That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of twenty-five dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th 1910.

INTERROGATORY No. IV.

Is it not true that you owe them for the construction of [141] building in Tacoma?

ANSWER TO INTERROGATORY No. IV.

No.

INTERROGATORY No. V.

If you say you do not owe anything, then state when and how you paid them for the building they built for you.

ANSWER TO INTERROGATORY V.

Paid them as set forth in answer to Interrogatory No. III.

INTERROGATORY No. VI.

State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and date of the completion of same.

ANSWER TO INTERROGATORY No. VI.

The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves.

INTERROGATORY No. VII.

When and how did you or either of you become in-

terested in the Wells Construction Company?

ANSWER TO INTERROGATORY No. VII.

Defendants, nor either of them, never became interested in Wells Construction Company.

INTERROGATORY No. VIII.

Is it not true that the defendant Peter Sandberg compelled the other stockholders of the Wells Construction Company to assign their stock and turn the same over to his attorneys, for his use?

ANSWER TO INTERROGATORY No. VIII.

No. [142]

INTERROGATORY No. IX.

Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

ANSWER TO INTERROGATORY No. IX.

No, the stock was turned over to Newton H. Peer and Charles T. Peterson under the following agreement:

In the latter part of November, 1910, defendant, Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg, would finance the company and enable it to complete the contracts he would be thereby able to save himself

any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an [143] investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholder should direct. That in accordance therewith defendant Peter Sandberg immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as trustees

to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

INTERROGATORY No. X.

Is it not true that the defendant Peter Sandberg entered into an agreement to carry out certain work or contracts of the Wells Construction Company in British Columbia?

ANSWER TO INTERROGATORY No. X.

No.

INTERROGATORY No. XI.

Please state just what the agreement was, and attach a copy of the same to your answer.

ANSWER TO INTERROGATORY No. XI.

The agreement and circumstances regarding the turning over of the stock is fully set forth and stated in answer to Interrogatory No. IX, and was made orally.

INTERROGATORY No. XII.

Did you carry out your part of the agreement?

[144]

ANSWER TO INTERROGATORY No. XII.

The answer to Interrogatory No. XI covers this.

INTERROGATORY No. XIII.

At whose request did you execute the notes mentioned in your answer, and the note sued upon in this case?

ANSWER TO INTERROGATORY No. XIII.

At the request of Simon Mettler and Joe Wells.

INTERROGATORY No. XIV.

Where were you when the notes were signed, and

where was the guaranty agreement executed that you mentioned in your answer.

ANSWER TO INTERROGATORY No. XIV.

As near as I remember the notes were signed here at Tacoma, and the guaranty agreement was signed at the Molson Bank in Vancouver, B. C.

INTERROGATORY No. XV.

The men signing the written guaranty agreement mentioned in your answer were members of the Wells Construction Company, were they not?

ANSWER TO INTERROGATORY No. XV.

So far as I know they were, excepting myself, I was not.

INTERROGATORY No. XVI.

Why did you execute this guaranty agreement, which made you liable for more than \$55,000?

ANSWER TO INTERROGATORY No. XVI.

I executed it for the accommodation of the Wells Construction Company, a corporation, and particularly for Simon Mettler.

INTERROGATORY No. XVII.

How much did you owe the Wells Construction Company at the time you signed this guaranty, or at the time you signed any of [145] the notes you mention?

ANSWER TO INTERROGATORY No. XVII.

I did not owe it anything.

INTERROGATORY No. XVIII.

Do you, Peter Sandberg, defendant, deny personal liability on the note sued upon, and for the amount alleged? If you say that you do deny liability, state the reasons why.

ANSWER TO INTERROGATORY No. XVIII.

No, because I signed the note.

BATES, PEER & PETERSON,
Attorneys for Defendants.

State of Washington,
County of Pierce,—ss.

Peter Sandberg, being first duly sworn, on oath deposes and says: That he has read the foregoing answers, and the same are true, as he verily believes.

PETER SANDBERG.

Subscribed and sworn to before me this 26th day of May, A. D. 1914.

CHARLES T. PETERSON,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Whereupon plaintiff rested its case.

Thereupon the defendant Mathilda Sandberg, on her own part, moved for a judgment of nonsuit and dismissal of the plaintiff's action as to her and the defendants Peter Sandberg and Mathilda Sandberg, as a community, moved the Court for a judgment of nonsuit and dismissal as to the community represented by them.

Both of these motions were overruled, the Court saying: "I think it would be better to overrule the motion temporarily at this time until the case is finally completed and hear the [146] argument all together."

Testimony of Matilda Sandberg, in Her Own Behalf.

Thereupon MATILDA SANDBERG, one of the defendants, testified as a witness in her own behalf and in behalf of the defendants to the following effect: That she was the wife of Peter Sandberg; That said defendant and Peter Sandberg were married November 30th, 1894; that at the time of their marriage defendant, Peter Sandberg, owned two lots in the city of Tacoma, worth about six hundred (\$600) dollars; that all of the property set forth in paragraph II of her answer, filed in this case, was acquired by her and her husband during the existence of their marriage, by their joint efforts; that said two lots, owned by Sandberg at the time of their marriage were afterwards sold and went into the community; that the list of real property set forth in paragraph II of the answer of Matilda Sandberg, and including the property where the Kentucky Building stands and the property where the Davis-Smith Building stands, was all community property; that Peter Sandberg and herself had been living together as husband and wife up to the time of trial and were then; that she knew nothing about Peter Sandberg indemnifying the American Surety Company of New York against any loss because of the American Surety Company going on the bond in the sum of twenty-five thousand (\$25,000) dollars for Wells Construction Company, and that she did not have anything to do with it or participate in it in

(Testimony of Matilda Sandberg.)

any way at all, and that she only heard of the transaction lately and after the lawsuit had commenced.

On cross-examination this witness testified that she was sure that none of the property which had been described in her answer was ever the property of Peter Sandberg before they were married and that she was sure he did not have any other property, and during all of the time that they had lived together [147] Mr. Sandberg was looking after all of the property interests and was looking after all of the business and that she always trusted her husband and did not take any part in that and that whatever had been made and whatever had been done had been done by Mr. Sandberg and she went along with him as his dutiful wife.

Subsequently this witness was recalled and testified that she never owned any stock in the Wells Construction Company nor was never interested in any way, and when she was asked whether she understood about her husband looking after all of their business and she answered that she had trusted him she understood it to be that the husband was looking after all of her business; that it was not contended that Mrs. Sandberg did not know that the Kentucky Building was being erected.

Thereupon the following proceedings took place:

“Q. Mr. Peterson has asked you whether or not you had any stock and you said no, and I am asking you whatever Mr. Sandberg did with the Wells Construction Company was agreeable to you, wasn't it?

(Testimony of Matilda Sandberg.)

Mr. PETERSON.—I want to object to that because that is entirely collateral. There may have been other matters and other things to which this matter has no connection with this transaction, which is a different proposition, or Mr. Sandberg may have had other dealings. The fact is that he did not, but it is not proper cross-examination.

Objection overruled. Exception allowed.

(Last question read by the reporter.)

Mr. PETERSON.—The witness must first have knowledge and then she must acquiesce and consent in the matter in order for her to be estopped. That is the only purpose of an interrogation of this kind. Otherwise it is immaterial.

Mr. BRISTOL.—Are you going to contend that Mrs. Sandberg did not know this building was being erected?

Mr. PETERSON.—No, sir. [148]

The COURT.—Objection overruled. Answer the question.

(Question read again by the reporter.)

A. Well, he did not have anything to do with it I understood.

Q. You heard Mr. Wells' testimony when he was on the stand? You were in the courtroom?

A. Yes, sir.

Q. If Mr. Wells told the truth, and let us assume that he did, I do not know anything about it except that he swore to, were those transactions which Mr. Sandberg had with the Wells Construction Company with your knowledge and consent?

(Testimony of Matilda Sandberg.)

A. I do not know anything about it.

Q. Was whatever Mr. Sandberg did in connection with that building agreeable to you?

MR. PETERSON.—I want to object to that as not proper cross-examination. That is merely speculation and conclusion for this witness to say that at this time.

Objection overruled. Exception allowed.

MR. PETERSON.—I want permission of the Court to ask this witness a question in that connection.

The COURT.—Proceed.

MR. PETERSON.—Q. Mrs. Sandberg, did you know about the dealings and transactions of Mr. Sandberg with the Wells Construction Company regarding this building and regarding other matters?

A. No, sir.

MR. BRISTOL.—I asked him if he contended that Mrs. Sandberg did not know that Mr. Sandberg was putting up this building. Now, he turns around and tries to stultify Mrs. Sandberg by asking this question. I assume, as a member of long standing at this and other bars that that way of trying a case would be disrespectful to your Honor, and I object to that and move to have these proceedings stricken out.

The COURT.—Motion denied and the objection overruled. The question not only involves what Mr. Sandberg had to do with the Wells Construction Company with reference to the construction of the building, but also about the giving of this bond. For Mr. Peterson to say that she did not know that the

(Testimony of Matilda Sandberg.)

building was being constructed would not carry any—(Interrupted).

Mr. BRISTOL.—We are talking about the building in this connection. [149]

The COURT.—You said whatever he had to do with the Wells Construction Company.

Mr. BRISTOL.—You have ruled upon that and he has constantly interrupted. I submit that we have got to this issue as to whether or not a married woman can be put upon the stand and deny knowledge of her husband's acts, and if that is going to be the issue here I am willing to meet it.

The COURT.—There is nothing before the Court at this time as I recall.

Mr. BRISTOL.—Then I will repeat my question.

Q. Mrs. Sandberg, did you know that your husband—(Interrupted).

Mr. BATES.—Let me call your attention to the fact that there is a question—(Interrupted).

Question read by the reporter as follows: 'Mrs. Sandberg, did you know about the dealings and transactions of Mr. Sandberg with the Wells Construction Company regarding this building and regarding other matters?'

The COURT.—I have sustained your objection to the question because there are two questions in one.

Mr. BRISTOL.—That is not my objection.

The COURT.—This is for the aid of the Court, no matter whether she answered yes or no I would still be in doubt as to what she meant.

(Testimony of Matilda Sandberg.)

Mr. PETERSON.—Well, then, I will ask permission to ask another question.

Q. Mrs. Sandberg, did you know about Mr. Sandberg's dealings with the Wells Construction Company with reference to this undertaking and agreement with the American Surety Company?

Mr. BRISTOL.—I object to that as immaterial whether she knew it or not.

The COURT.—That is one of the final issues in the case. The objection will be overruled.

Exception allowed.

A. No, sir.

Mr. BRISTOL.—Q. Did you know that Mr. Sandberg was putting up this building?

A. Well, he put up many buildings. Which do you mean?

Q. The Kentucky Building? A. Yes, sir.

Q. When did the construction of that building commence? [150]

A. I have not kept any books, so I do not know.

Q. What is your best recollection when it commenced?

A. Well, I really could not answer you.

Q. Mr. Wells testified that it commenced in the fall of 1909. Do you remember whether that is so or not?

A. No, sir; I do not.

Q. Mr. Wells stated that the excavation of that building was finished in January, 1910. Do you remember whether that is so or not? A. No, sir.

Q. Did you ever see that building in the course of construction? A. Yes, sir.

(Testimony of Matilda Sandberg.)

Q. When. A. Well, I do not remember.

Q. Was it during 1910? A. I could not say.

Q. Did you go there at any time with your husband? A. Yes, sir.

Q. How often did you go to the building with your husband during the course of its construction?

A. I do not know; I could not answer that.

Q. Well, was it more than once, twice or three times, or frequently? A. I could not answer.

Q. How many times do you think it was?

A. Maybe two or three times; I do not know.

Q. How often did you go to the building, directing your attention to the summer of 1910, between the months of May and September before all the little odds and ends had been finished up and the building had been turned over completely, just before that how often do you think you had gone there with your husband?

A. I could not say. I do not believe I was down there once.

Q. You do not think you went there once? [151]

A. No, sir.

Q. You do not think you went to the building at all? A. No, I do not think I did.

Q. You do not think you went to the building at all? A. No, sir.

Q. And you never saw the building while it was being constructed? A. Yes, sir.

Q. And you knew your husband was putting it up?

A. Yes, sir.

(Testimony of Matilda Sandberg.)

Q. And you knew the Wells Construction Company was doing the work for him?

A. I could not answer that, because I do not know.

Q. You saw Mr. Wells before that?

A. Yes, sir.

Q. You knew he was doing that work?

A. I seen him working there.

Q. That was one of the pieces of property you and your husband acquired after you were married?

The COURT.—She has already answered that.

A. Yes, sir.

Q. And you knew it cost money to put up that building there? A. Yes, sir.

Q. You naturally knew that your husband would have to make payments on that building contract?

Mr. PETERSON.—I object to that on the ground that it is not proper cross-examination and argumentative.

The COURT.—Objection sustained.

Mr. BRISTOL.—Of course, I have not under the rules of this court any right to assume anything and so I am not assuming, but I am assuming to your Honor as a matter of courtesy that when a witness is turned over for cross-examination, under the circumstances that this record denotes, that counsel's argument during a testy situation concerning an issue which your Honor pronounced the main issue in the case, that I now remind your Honor respectfully of the rule; that I have an unwilling witness; [152] that I should be allowed that judicial width of examination which I am entitled to.

(Testimony of Matilda Sandberg.)

The COURT.—But to assume that there is any question about the witness knowing of the building of an eight story building; that a man would not pay money for it when he got it built, and had to pay for it, did not seem to me like proper cross-examination.

Mr. BRISTOL.—Q. Do I understand that you claim you did not know anything about the putting up of this building?

Mr. PETERSON.—I submit that that has been answered.

Objection overruled.

Mr. BRISTOL.—Q. Do I understand you to state here that you did not know your husband, Peter Sandberg, was putting up this building?

A. Yes, he was putting up the building so far as I know.

Q. In the course of his entire business career in Tacoma, and while you have been married to him, has he told you item by item and in each case all of the transactions he has had?

Mr. PETERSON.—I object to that as not proper cross-examination. I called this witness for two questions.

Objection overruled. Exception allowed.

Mr. PETERSON.—I think counsel should make the witness his own witness in this matter so we can cross-examine.

Objection overruled. Exception allowed.

(Question read.)

A. No, sir.

Q. So there have been many of his business trans-

(Testimony of Matilda Sandberg.)

actions, including those with the Wells Construction Company that you did not know anything about?

A. No, sir, I do not know anything about them.

Q. Might I ask you if one of those transactions—now, I want to say to the Court and to you, Mrs. Sandberg, that Mr. Peterson has forced me to submit this matter to you, and I would not do it if it had not been for Mr. Peterson's attitude toward me. I show you Exhibit No. 8 in which you as a defendant, Peter Sandberg and Matilda Sandberg together, in the Superior Court of the State of Washington, make answers to certain interrogatories, and you were asked in those interrogatories, 'Did the Wells Construction Company do any work for you or either of you at any time before the execution of the note sued on in this case? Answer, Yes.' Now, if it can be possibly true that you have no knowledge about this Wells Construction [153] Company business, how could you say 'Yes' to that interrogatory? Now, look at the paper and think it over yourself.

Mr. PETERSON.—Did she verify any of those interrogatories?

Mr. BRISTOL.—I do not care whether she verified it or not. You put your name to them.

The COURT.—If you are going to be so positive with one another, stand further away from the witness.

The COURT.—(Addressing the witness.) Do you understand the question, or have you any explanation to make of your answer.

(Testimony of Matilda Sandberg.)

A. I do not know what answer to make; I cannot understand this at all.

Mr. BRISTOL.—Q. You said in that particular interrogatory when they asked you if the Wells Construction Company was doing any work for you, you answered yes, did you not?

A. Yes, sir.

Q. Now, when they got along a little further, looking at this interrogatory, the second interrogatory this time, where Messrs. Bates, Peer & Peterson in this case for the defendants, and Mr. Sandberg, your husband, swears to it, 'Peter Sandberg, being first duly sworn, on oath deposes and says that he has read the foregoing answers and the same are true as he verily believes.' That second interrogatory was, 'If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done and the contract price therefor', and I call your attention to that to which this answer is made: 'The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was thirty-three thousand (\$33,000) dollars. That during the construction of said building an additional story was added thereto as an extra, at

(Testimony of Matilda Sandberg.)

the agreed price of thirty-five hundred (\$3500) dollars. That there were certain other extras consisting of digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in the store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1379, making the total contract price for said building, including extras \$37,879.' Now, in view of that interrogatory and that statement, please explain to me how you can say you do not know anything about your husband's dealings with the Wells Construction Company?

Mr. BATES.—I object to that as incompetent, irrelevant and immaterial and not proper cross-examination, because the paper which the witness is interrogated from shows on its face that they were answers made by Peter Sandberg and not by this witness. [154]

The COURT.—That might be true and yet the question would be preliminary and leading up to how much she knew of those answers. The objection will be overruled.

Exception allowed.

Mr. BRISTOL.—On this very paper prepared by Bates, Peer & Peterson, they say, 'Come now defendants, and answering interrogatories propounded by the plaintiff herein say,' and the husband signed this paper and swore to it, and certainly if they were defendants and she let him do it—

(Interrupted.)

(Testimony of Matilda Sandberg.)

The COURT.—You remember I said in the beginning that pleadings and admissions do not have any great weight with the Court.

Mr. BRISTOL.—I have recollection of the Court's admonition, but I may be pardoned by asserting as a proposition of law that those rules are fixed.

The COURT.—Some of the Courts of the country hold that they are not admissible in evidence at all.

Mr. BRISTOL.—As pleadings in the case, but this happens to be interrogatories in a case in which these very matters are at issue, the question of knowledge of these parties, and it appears in that matter (indicating) and others.

Q. I want to know whether in view of that statement now, and your mind refreshed, you still adhere to the statement that you had no knowledge of what the Wells Construction Company was doing?

A. No, sir, I do not know anything about it.

Q. You do not know anything about it?

A. No, sir.

Q. That is your answer notwithstanding the paper which you hold in your hand? A. Yes, sir.

Mr. BRISTOL.—The paper referred to being Plaintiff's Exhibit No. 8.

Redirect Examination.

(By Mr. BATES.)

Q. Mrs. Sandberg, I suppose of course, you knew this eight story building was being built by Mr. Sandberg? A. Yes, sir.

Q. You knew that it was completed?

(Testimony of Matilda Sandberg.)

A. Yes, sir. [155]

Q. Did you know anything about the terms and conditions of the contract under which it was constructed? A. No, sir, I did not.

Q. These questions that have been referred to, did you ever make any answer to those questions yourself? A. No, sir.

Q. Did you ever see them or hear of them before?

A. No, sir.

Q. Know nothing about them whatever?

A. No, sir.

Mr. BATES.—I am referring, if your Honor please, to the questions and answers in Plaintiff's Exhibit No. 8.

Mr. BRISTOL.—Q. Do you know whether Messrs. Bates, Peer & Peterson were your husband's attorneys? A. Yes, sir.

Q. Are Messrs. Bates, Peer & Peterson your attorneys? A. Yes, sir.

(Witness excused.)"

Testimony of Joseph Wells, for Defendants.

JOSEPH WELLS was offered as a witness on behalf of the defendants and among other things testified that he was the original incorporator of Wells Construction Company and had the contract for the *Power River Paper Company, Ltd.*, upon which the American Surety Company of New York, was surety and that that was the contract out of which the paper, Plaintiff's Exhibit No. 2, arose, and that he was vice president for a time and secretary for a time and then held both offices combined;

(Testimony of Joseph Wells.)

I have made a search for the stock-books and corporate books of the Wells Construction Co. in the usual places where those books were kept and where they might be found—looked high and low in Vancouver and in Tacoma in places where they should be found, and I have been unable to find them. I made this search at the request of Mr. Peterson. [156] Part of the books were in Tacoma and part of them in Vancouver, B. C. At one time I was considering getting a man in Vancouver, B. C. to take part of the stock, and my recollection is, I took the stock-books up there. A liquidator was appointed for the company in Vancouver, and a receiver was appointed for the company in Tacoma.

That there had been a receivership of the company and that Lund & Lund were attorneys for Wells Construction Company, and Betes, Peer & Peterson were attorneys for the receiver; that Frank Allyn, of Tacoma, was receiver; that the receiver took possession of the office and took all the books, ledgers and day-books, and the rest of the belongings of the company; that he might have taken the stock-book up to Vancouver himself; that there was a manager in the office in Vancouver by the name of Cederburg and the witness did not know whether Cederburg had possession of the stock-book or not or whether Cederburg took it away; that they had some man up there to talk over the idea of taking this stock; some man by the name of Cotton, to put some money into the company; that it was not a fact that the corporate records of the Wells Construction Company were

(Testimony of Joseph Wells.)

destroyed by himself and he denied that they were destroyed by himself.

Thereupon the witness testified that at no time during the existence of the corporation was Mr. Peter Sandberg a stockholder. To this answer of the question seeking the information plaintiff objected as not the best evidence, mere hearsay and the record had not been found nor accounted for, but the Court permitted the witness to answer and plaintiff saved an exception. [157]

Thereupon the books not being produced, the plaintiff moved to strike out the testimony of the witness that Sandberg was not a stockholder on the ground that necessary diligence had not been shown for the failure to produce the books and the testimony given had not accounted for the failure to produce the books.

Thereupon the Court denied the motion saying:

“It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time.”

To which action and ruling of the Court counsel for plaintiff there and then took an exception.

(Testimony of Joseph Wells.)

On cross-examination this witness testified that they had the stock-books in Vancouver in their office; that when the witness made the trip to Vancouver he had the certificate in his pocket and the stock-book was in the office in Vancouver and that the reason he had the stock certificates in his pocket when the stock-book was in Vancouver was because at that time the stock Mr. Mettler and Mr. Vergowe had was in trust with Mr. Peterson and Mr. Peer and that witness requested to have the stock so he could make the transaction; that the stock-books were not in Tacoma and that they were not in the possession of Messrs. Bates, Peer & Peterson at the time witness went to Vancouver; that the witness could not make any other or different explanation how this stock as a matter of record stood on the books of the company other than with Messrs. Bates and Peterson as trustee.

The witness then testified that Mr. Sandberg paid some of [158] Wells Construction Company accounts direct, like Tacoma Mill Work & Supply Company and the plastering and charged the same to the Wells Construction Company account; that when he made his statement October 3, 1910, he claimed \$37,879, totally due for the building and allowed a credit of \$1,331.40 and that the amount of \$36,547.60 was the amount Peter Sandberg was debtor to the Wells Construction Company October 3, 1910; that they started the work on the building December, 1909, and they were from some time in

(Testimony of Joseph Wells.)

January the following year until well along in October of that year before the building was turned over to Mr. Sandberg; that the building is called the Kentucky Building and the one in which Mr. Sandberg did business for a long time and had his office; that although the company was in the hands of a receiver in Tacoma and in the hands of a liquidator in British Columbia, the stock-books were in British Columbia and witness had the capital stock of the company in his pocket under letter from Mr. Peterson and then came back from Vancouver and left the stock lay in his desk in Tacoma. That Mr. Sandberg did not render his statement to the Wells Construction Company until November 29, 1910.

Thereupon Mr. Peterson asked the witness Wells this question:

“Mr. PETERSON.—Q. Did you or the Wells Construction Company or anybody in its behalf ever give Mr. Sandberg anything for signing this indemnity agreement, Plaintiff’s Exhibit No. 2?”

To which evidence sought to be adduced thereby the plaintiff objected on the ground that they were estopped to show whether anything was given to Sandberg or not, and it would not be material whether anything was given or not.

This objection was overruled and the Court allowed an exception, and the witness answered, “No, sir.”

Thereupon the witness testified that the Wells Construction Company was engaged in the construction of a building in the city of Tacoma, in 1910,

(Testimony of Joseph Wells.)

and at the time the indemnity agreement in evidence was given, for Mr. Sandberg. And thereupon the witness was asked whether that had anything to do at all with the giving of the agreement, Exhibit No. 2, to which the plaintiff objected on the ground that it called for the opinion of the witness and that it was a question for the Court and the Court overruled the objection and allowed an exception. And thereupon the witness was asked whether there [159] was anything said about the company's business in the construction of a building in Tacoma in connection with Sandberg's going on the indemnity agreement and the same objection was again made and the Court made the same ruling and allowed the exception and the witness answered, "No, sir."

Thereupon there was introduced in evidence Defendant's Exhibit "A," which was the contract for construction of the building known as the Kentucky Building in Tacoma, by Wells Construction Company and Peter Sandberg and the witness was asked whether or not any changes were made in the structure covered by the contract and stated that there was to be an extra story put on the building at an extra cost of something like \$3500.

Thereupon Defendants' Exhibit "A" was offered and received in evidence and the witness stated that Wells Construction Company did not have any other business with Mr. Sandberg in 1910 than the construction of this building, Exhibit "A" is a written contract dated January 22, 1910, between Wells Construction Company and Peter Sandberg

(Testimony of Joseph Wells.)

for the erection of a seven story reinforced concrete building, at 1128 Pacific Avenue, Tacoma, Washington, for the lump sum of \$33,000, payments to be made on the 1st day of each month, upon 85% of finished work. Contract contents provides building to be completed on, or before May 1, 1910, and if not so completed, contractor to pay demurrage at the rate of \$25 per day for each day thereafter until building is completed.

Thereupon witness was shown a number of checks as follows:

Date.	By Whom Drawn.	Payee.	Amount.
Jan. 22, 1910	Peter Sandberg.	Wells Construction Co.	\$5,000.00
Feb. 12, 1910	" "	Joseph Wells	1,550.80
Feb. 12, 1910	" "	" "	5,000.00
Marked,	To apply on construction	1128 Pac. Ave. Bldg.,	
Mar. 3, 1910	Peter Sandberg.	Wells Construction Co.	4,000.00
[160]			
Mar. 17, 1910	Peter Sandberg.	Wells Construction Co.	4,000.00
Apr. 9, 1910	" "	" " "	5,000.00
" 23, 1910	" "	Joseph Wells	2,000.00
" 25, 1910	" "	Wells Construction Co.	1,000.00
May 19, 1910	" "	" " "	5,000.00
Jun. 4, 1910	" "	" " "	1,500.00
" 18, 1910	" "	" " "	1,500.00

And checks aggregating \$1,432.25, made by Peter Sandberg between April 30, 1910 and August 27, 1910, to men who furnished labor and material for Wells Construction Company for the construction of the Kentucky Building; said payments aggregating, all told, \$35,604.40, of which the witness said were payments made to the Wells Construction Company on account of the construction of said building under said contract; that said building was completed in October, 1910. Said checks were re-

(Testimony of Joseph Wells.)

ceived in evidence without objection.

Thereupon defendant offered in evidence Exhibit "C," written on a letter-head of Wells Construction Co., under date of October 3, 1910, as follows:

"Tacoma, Wash., Oct. 3d, 1910.

Mr. Peter Sandberg, Dr.

To Wells Construction Co.,

Contract price as per agreement.....	\$33,000.00
To extra painting exterior brick work, 1130 Pac. Ave.	125.00
Digging and concrete work in sub-base- ment	739.00
Enlarging Chimney, 120 Ft. at \$2.00 per foot	240.00
To Labor and Material furnished in An- drews Jewelry Str.	200.00
To putting on one additional story	3,500.00
Fifteen stationery sash in halls, old build- ing	75.00
Total	\$37,879.00

[161]

Cr.

By, Balance owing to Grosser for Plastering	\$ 777.50
By, Our portion of Sheet Metal works	190.70
By, To Bill of Cizek's, for rep. skylight in Langlow Building	17.90
By, to Credit for 16 wooden windows, @ \$5.50 Pr.	98.00

(Testimony of Joseph Wells.)

By, Lumber delivered to us at

Puyallup 247.30

\$1,331.40	1,331.40
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Balance\$36,547.60

Thereupon counsel for plaintiff objected to the admission of the statement in evidence upon the ground that it is not responsive to any issue in the case and cannot be received because in variance with Sandberg's written contract with the plaintiff, and thereupon the Court ruled:

"It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

Thereupon Mr. Peterson stated that plaintiff in its complaint alleges that Mr. Sandberg was indebted to Wells Construction Company because of the construction of this building and in satisfaction of that he executed this indemnity agreement, to which counsel for the plaintiff replied "that was of June 2d, that is why I was objecting with reference to a statement including transactions clear up to October, when the construction we are dealing with here was in June, 1910. I do not want any one misled as to my purpose."

Thereupon the Court overruled the objections to

(Testimony of Joseph Wells.)

the admission of said statement and the same was admitted and received in evidence as Defendant's Exhibit "C" and the Court allowed an exception. [162]

The witness further testified that Exhibit "C" does not contain a credit of the payments made by Mr. Sandberg on account of the building contract.

Thereupon Defendant's Exhibit "D," as follows:
 "Wells Construction Company. Nov. 29th—10.

In account with Peter Sandberg.

Balance due on merchandise..\$	102.95
'IOU' Joe Wells 8/2, 1910.....	30.
'IOU' Matteson	40.
Cash Joe Wells 12/28,1909..	30.
Labor Kentucky bldg. 40 dys.	
at \$2.50 day.....	100.
Paid Wells Con. Co., acct. con-	

tract Ky. bldg.	35604.40
"IOU" Barton Mch. 8th, 10..	90.
Tacoma Millwork Supply Co.	
bill 8th floor.....	243.49
Two doors short at Kentucky	
Building	100
Windows at elevator shaft	
short	25.
Cleaning floors third story in	
Ky. bldg.	300.
Breaking skylights at Lang-	
low building	17.90
Switches for lights in Ken-	
tucky building	700.00

(Testimony of Joseph Wells.)

Wiring eighth floor, for bell

push buttons 200.

Ten fire doors, short..... 200.

\$37783.74

As per contract let..... 36547.60

Balance still due me..... 1236.14''

—was offered in evidence. The witness testified that it was a copy of a statement received by the Wells Construction Company from Mr. Sandberg, setting forth the credits which he claimed in connection with the construction of the Kentucky building under the contract, Exhibit "A," and further testified that the different items therein, so far as the cash payments were concerned, were correct, but that he complained about some small personal accounts contained in the statement, without designating [163] them, to which offer in evidence the plaintiff objected upon the ground that it was collateral matter and could not be admitted to vary his contractual relations with plaintiff, and as not bearing upon the issue of the case because of the fact that Wells Construction Company made a statement to Mr. Sandberg of how much he owed the company in November and Mr. Sandberg issued to the company a statement of how much the company owed him in November, did not alter the status of the parties in June, 1910, which was the time he went into this with plaintiff and which is the time when he stated he was beneficially interested.

The Court overruled this objection and admitted

(Testimony of Joseph Wells.)

and received in evidence the statement marked Defendants' Exhibit "D" and allowed an exception.

The witness thereupon testified that in June, 1910, he was general manager of the company and that at that time the Wells Construction Company was in good standing, was solvent and had good credit and could get anything they wanted in the shape of loans at the bank and could carry on the construction of the Kentucky Building without the assistance of anybody on the outside; that the statement he signed on June 2, 1910, with reference to the application for a contract bond made to plaintiff American Surety Company of New York described the building which was under contract to Peter Sandberg as the Kentucky Building and that it was about ninety-five per cent completed; that the reason the building was not completed until November was because there was a lot of work to be done on the adjoining building; the building was not completed in June, but about ninety-five per cent completed,

The witness further testified, on cross-examination, that in June, 1910, the Kentucky Building was 95% completed; that in November, 1910, I was trying to get new parties to come into [164] the Wells Construction Company so as to get on a new financial footing, and complete the work, and carry out the contracts on hand. I took the certificates of stock of the Wells Construction Company, and went to Vancouver, B. C. The stock book of the company was in our office there. The certificates of stock, which I took with me on that trip, was the stock

(Testimony of Joseph Wells.)

that Mr. Mettler and Mr. Vergow had placed in trust with Mr. Peterson and Mr. Peer, and I requested to have it so that I could complete the transaction of financing the company.

Mr. Peterson, Mr. Sandberg and Mr. Rydstrom went with me to Vancouver. I had two certificates at that time for 124 shares each and two for one share each; that the stock-books and records of the company had never been in the hands of Mr. Sandberg or Bates, Peer & Peterson, his attorneys. All the checks which Mr. Peterson introduced in evidence were payments made to the Wells Construction Company, by Mr. Sandberg, for work done by the Wells Construction Company on the Kentucky Building. The several checks made to other parties were made at the request of the Wells Construction Company to men who performed labor for it under the contract on the Kentucky Building, and for material which went into the building under the contract. We asked Mr. Sandberg to make these payments, and charge the same to our account. Some of these checks went thru the Fidelity Trust Company Bank and some went thru the Pacific National Bank, but the Wells Construction Company had accounts at both banks.

The Kentucky Building is the one in which Mr. Sandberg had his office, and did business for a long time. I did not return the capital stock of the Wells Construction Company to Mr. Peterson. It has been in my possession ever since, in my desk at home.

The Wells Construction Company and Mr. Sand-

(Testimony of Joseph Wells.)

berg had some [165] controversy over the settlement of the account for the construction of the Kentucky Building, and the statement rendered by the Wells Construction Company to him, and the statement rendered by Mr. Sandberg to the Wells Construction Company arose out of that controversy.

Testimony of Simon Mettler, for Defendants.

SIMON METTLER was thereupon called as a witness on behalf of the defendants and among other things testified that during the year 1910, the Wells Construction Company was engaged in the construction of a building for Peter Sandberg known as the eight-story building called the Kentucky Building in Tacoma; that he was an officer of the corporation along in the fall of 1910, in September and October. The witness was then asked the following questions and testified as follows:

“Q. What is your recollection as to the amount that had been paid at that time when you had that conversation with Mr. Sandberg?

A. Why, I had asked him for five thousand dollars. We were pressed for money and he says, ‘Why, you have not got that much coming,’ and I says, ‘Well, I am not positive,’ because I was negligent in looking after the books, and Mr. Lund kept the books for us, and I says to Mr. Sandberg, ‘What in your opinion have you paid,’ and he says, ‘I think I have paid you in the neighborhood of thirty-two thousand dollars,’ and that was practically to my recollection all except the extra that was to be paid, that is the extra for the top story.

(Testimony of Simon Mettler.)

Q. You did not have the books at that time?

A. No, sir.

Q. Or Mr. Sandberg either? A. No, sir."

The witness then testified that he was one of the incorporators of the company and that it succeeded to the business of the Tacoma Bridge Company in the early spring of 1910. Thereupon the witness was asked this question:

"Q. You are representing the company,—I will ask you [166] if you represented the company in connection with seeing Mr. Sandberg about getting him to sign this indemnity to the American Surety Company on which this suit is based?

A. What is the question?

Q. I will ask you whether or not you were representing the Wells Construction Company in obtaining Mr. Sandberg's signature to this indemnity contract, Plaintiff's Exhibit No. 2, which is the indemnity agreement given to the Surety Company in connection with the Powell River Contract?

A. Yes, I asked Mr. Sandberg in behalf of our company.

Q. Was there anything said about the relations or business of the Wells Construction Company with Mr. Sandberg in building this building in connection with this matter?

Mr. BRISTOL.—I object to that upon the ground that whether or not there was would be immaterial, and if there was it could not be received in evidence because it would be violating a written contract, and

(Testimony of Simon Mettler.)

there being no person present at this conversation representing the American Surety Company, it would not be binding.

The COURT.—That might be true as far as Mr. Sandberg is concerned, but there remains a question of whether it would be as regarding the wife and communitiy. The objection will be overruled. Exception allowed.”

And thereupon the witness was permitted to answer the question over the plaintiff's objection and did answer, “No, sir.” Thereupon the following question was asked the witness:

“Q. Did Mr. Sandberg receive anything from you or the Wells Construction Company for signing this agreement?

Mr. BRISTOL.—I object to that upon the ground that it is entirely immaterial, and in order to get the matter before your Honor in this connection, that the estoppel was overlooked by your Honor in my last objection, and I do not wish your Honor to overlook it here. If you will consider it, that whether there was anything paid or received by Mr. Sandberg or not is immaterial; this contract with us shows that he is beneficially interested and is estopped. We have executed this contract upon the basis of that statement of his, and the wife is estopped and he is estopped, by well considered cases in the Supreme Court of the State of Washington.

The COURT.—The main point which will have to be [167] decided in the case is whether the wife is estopped.

(Testimony of Simon Mettler.)

Mr. BRISTOL.—As a matter of law my objection is this: That when the husband acts as Mr. Sandberg acted, she cannot come back and offer this evidence out of Mr. Mettler's mouth or that of anyone else merely to clear the community.

Objection overruled. Exception allowed.

Mr. BRISTOL.—May I have my objection to all of this so as not to interrupt?

The COURT.—Yes, it will be considered as going in over your objection.

(Question read.)

A. No, sir.

Q. Did Mrs. Sandberg receive anything?

A. No, sir.

Q. From you or the Wells Construction Company for the execution of this agreement?

A. None whatever.

Q. Did Mr. Sandberg have any concern or any interest in this contract with the Powell River Paper Company? A. Absolutely none.

Q. Mr. Mettler, during the month of June, 1910, and immediately before and after that date, what was the financial condition of the Wells Construction Company?

Mr. BRISTOL.—That is the same matter I objected to this morning and I make the same objection now.

Objection overruled. Exception allowed.

A. The financial situation was in good shape then at that time."

Thereupon the witness testified that the financial

(Testimony of Simon Mettler.)

condition of the Wells Construction Company was good, that it could have completed the Kentucky Building without assistance from anybody and that it was not necessary that Sandberg sign the agreement, Plaintiff's Exhibit No. 2, to enable the Wells Construction Company to carry out the contract of the Kentucky Building. Thereupon the following question was asked the witness: [168]

"Q. Who were the stockholders of the corporation during that time?

Mr. BRISTOL.—I object to that as not the best evidence, the corporate records not having been produced or accounted for.

The COURT.—Well, it is accounted for so far as the other witness, but this witness, being an officer of the company might be able to tell more about it.

Mr. PETERSON.—Q. Do you know where the books and records of the Wells Construction Company are? A. No, sir.

Q. Have you known since the company became insolvent in 1910?

A. I have never had the slightest idea.

Q. Supposing you were requested now to say if you could produce them, would you have any idea where to go to get them?

A. No, sir, absolutely none.

Q. Do you know who the stockholders of the corporation were during its existence?

A. Yes, from my recollection there was only four of us, Mr. Wells, Mr. Vergowe, myself and Mr. Lund.

Q. Were Mr. or Mrs. Sandberg or either of them

(Testimony of Simon Mettler.)

ever stockholders in that corporation?

Mr. BRISTOL.—I object to that as not the best evidence, and that it is a question which involves a matter which cannot be produced out of the mouth of this witness under any theory of this case and that it is incompetent.

The COURT.—The objection is overruled, but all that his answer would amount to in the negative would be that he did not know of his having been a stockholder at any time. It is simply asking for the negative.

A. No, sir, they never had any stock in it.

Q. Were they ever interested in any way in the corporation?

Mr. BRISTOL.—I object to that on the ground that this witness cannot be asked whether they were interested or not.

The COURT.—It amounts to whether he knows or not, that is all.

A. They had absolutely nothing to do with it.

Q. Did they ever have any dealings with it outside of the company building the building over here?

A. No, sir. [169]

Mr. BRISTOL.—Did they ever have any dealings with what, with the Wells Construction Company? Do I understand you to answer that Mr. Sandberg never had any dealings with the Wells Construction Company except this building over here?

A. Not previous to that.

Q. Previous to what?

A. To our building that building.

(Testimony of Simon Mettler.)

Q. Not previous to the construction of the Kentucky Building.

Mr. PETERSON.—Q. Did they ever have anything afterwards to do with it excepting the signing of this bond and the endorsement of some notes and one thing and another which Mr. Sandberg finally sued you on? A. That is all.

Q. Did you ever agree to pay or compensate or give Mr. or Mrs. Sandberg anything for Mr. Sandberg's signing of the agreement, Plaintiff's Exhibit No. 2?

Mr. BRISTOL.—I object to that upon the ground that it is absolutely immaterial whether he says that he agreed to do it or not; it would not make any difference what he agreed to do.

The COURT.—Do you contend that there is more in this question than the last one in which you asked him substantially the same thing?

Mr. PETERSON.—I asked him if there was ever any agreement to give him anything.

Objection overruled. Exception allowed.

A. None whatsoever."

On cross-examination this witness testified that he had asked Sandberg to go to Vancouver to endorse a lot of notes up there for Wells Construction Company during the summer of 1910 and before the completion of the Kentucky Building.

Thereupon the witness was asked this question:

"Q. Didn't you testify in the Molson Bank case in relation to this same matter as follows:

'Q. What are the circumstances leading up to

(Testimony of Simon Mettler.)

that? A. That he signed the notes with us? Q.

Yes. A. Well, because we was pressed for money—'

that is, speaking of signing the notes and doing the other things. You were [170] asked by Mr.

Peterson, 'What are the circumstances leading up to that? A. That he signed the notes with us? Q.

Yes. A. Well, because we were pressed for money,

very seriously and we tried to get money from the

bank—Molsons Bank in Vancouver, B. C.—and I

was over there once or twice before trying to get the

money, and finally the answer was I should have

another strong man to back me up and then possibly

we could make arrangements to get money from

them. They knew my record about that time and

that I was pretty strong. They knew that the com-

pany was not worth an awful lot, and they said they

would probably help us out if we could get another

man; so I came back and induced Mr. Sandberg to

go over there, after some coaxing him and talking

things to him.' Did you so testify?

A. I might have used that particular word.

Q. And the question I have read to you, is that substantially your testimony on that occasion?

A. Yes, sir."

Thereupon the witness was asked this question:

"Q. Your fiscal year runs in January, and ours runs in July. I got them mixed. Now, getting back to your knowledge that Mr. Peterson talks about as an officer of the company: I understand you to say it was not until October or late in Sep-

(Testimony of Simon Mettler.)

tember that you and Mr. Sandberg had the talk then about enabling you to get something from him on account of the building, have I got that right?

A. Yes, sir."

Thereupon the witness was asked this question:

"Q. Was your receivership in Tacoma before your liquidation in Vancouver, or which way was it?

A. I could not answer that.

Q. What is your best recollection of it?

A. Ordinarily speaking, about the last part of October,—no, I think it was in November, I threw up the sponge.

Q. Now, watch: Talking about this sponge throwing and letting everything go, isn't it a fact that previous to that Mr. Sandberg required yourself and Mr. Vergowe and your respective wives to indemnify him, to convey a lot of property to him?

A. Yes, I think there was something like that."

[171]

Thereupon the witness was asked this question:

"Q. Now, in this complaint, and for the purpose of advising you as to your arrangement, and why I asked you about whether you were a strong man in the company or not, I will call your attention to this allegation made by Mr. Peter Sandberg, in the case in which he sued you: 'That on or about said last date above referred to, to wit, the — day of August, A. D. 1910, the defendants, Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his

(Testimony of Simon Mettler.)

wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation, in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business, and in accordance therewith said George E. Vergowe and wife and said Joe Wells and wife and said Wells Construction Company, a corporation, executed their deeds of conveyance to the property to be conveyed by them, to wit, the following lands and premises all in Pierce County, Washington,' and so on. Now, in view of your relations with the company and with your recollection refreshed from that allegation, state what you meant when you said to Mr. Peterson that there was no consideration given to Mr. Sand-

(Testimony of Simon Mettler.)

berg for what he did in consideration of the agreement made with him about what he did with the Wells Construction Company.

A. There was not at the time when I asked him about it.

Q. You did not mean to hold back anything? You probably had forgotten about this? A. I did.

Q. The fact is you fellows did have an arrangement with him? A. Not at that time.

Q. Well, I know, but whether you made it at the minute that he did, as a matter of fact, he demanded that the arrangement be made, and you acceded to it? A. Could you blame me?

Q. Well, doesn't he tell the real truth about it?

The COURT.—If this lawsuit has not been determined, the witness might not be free to answer.
[172]

The WITNESS.—What is it you want to know?

Q. How, now, in view of you having your recollection refreshed with reference to that agreement that he alleges was made there, can you say to Mr. Peterson that there was nothing between you and Mr. Sandberg in consideration for his signing those agreements.

A. Absolutely not at the time I asked him for it.

Q. I know, but why did you give him deeds and indemnity afterwards, why did you and Mr. Vergowe and Mr. Wells give him deeds and indemnity afterwards?

A. Because I wanted to play fair with the man.”
Thereupon the witness was asked this question:

(Testimony of Simon Mettler.)

“Q. Then Mr. Sandberg’s statement in this complaint as to what the agreement was between you and Mr. Vergowe and Wells and himself is not correct, is that right? A. I do not know.

Q. You do not know? A. No, sir.

Q. Why did you say that in view of your former answer?

A. Because I do not know there was anything like that (indicating paper) in existence.

Q. Why did you give the deeds?

A. What did I care who got the stuff after I was broke.”

Thereupon there was an argument between counsel as to the effect of the complaint by Peter Sandberg against Simon Mettler and others and colloquy between Court and counsel as to the application of the testimony, whereupon counsel for the plaintiff stated: “We are in the unfortunate position of pursuing one of two points, either we are pursuing a will-o’-the wisp, the deeds not being recorded, or else that complaint when it was filed, where Peter Sandberg says it was executed, either they are held and not recorded,” whereupon the Court stated: “is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.”

I did not deed or convey any property to Mr. or Mrs. Sandberg, or either of them, or give them any-

(Testimony of Simon Mettler.)

thing to induce Mr. Sandberg to sign the indemnity agreement, or any other papers that he signed for me or the Wells Construction Company. The only papers which I did sign is the paper marked Plaintiff's Exhibit No. 9, offered thereon, and received in evidence as follows: [173]

Plaintiff's Exhibit 9—Agreement, November 26, 1910, Between Kentucky Liquor Co. et al. and Simon Mettler.

“THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, A Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife, parties of the first, and SIMON METTLER, party of the second part.

WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia Corporation, and the Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., a certain real property in Pierce County, Washington, described as follows, to wit:

Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and

Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26) Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

The north thirty (30) acres of the Northwest quarter ($\frac{1}{4}$) of the Northwest ($\frac{1}{4}$) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest quarter ($\frac{1}{4}$) of the Southwest quarter ($\frac{1}{4}$) of the Northwest quarter ($\frac{1}{4}$) of the same Section, Township and Range, which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

A note for the sum of Twenty-five Thousand (\$25,000) Dollars, made by the Wells Construction Company to said Bank of Vancouver, dated at Vancouver, B. C.,——— 1910, due ninety days after date.

A note for Fifty-five Thousand (\$55,000) Dollars,

made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C., ——— 1910, and further [174] to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand (\$10,000) Dollars; One to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand (\$3000) Dollars;

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand, Five Hundred Dollars (\$79,500), besides interest;

And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Invest-

ment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent.

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, a trustee, shall apply by conversion or otherwise, as much of said property above described as may be necessary to satisfy and discharge [175] the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Ken-

(Testimony of Simon Mettler.)

tucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, The Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their president and secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

Signed, Kentucky Liquor Company, a corporation, by Peter Sandberg, its President, Attest, P. H. Lack, Secretary. Wells Construction Company, a corporation, by Charles T. Peterson, its President. Attest, Newton H. Peer, Secretary. Geo. E. Vergowe. Simon Mettler."

Thereupon the witness was asked this question:

"Q. Now, Mr. Mettler, I show you in that connection what I presume is the other agreement you refer to and ask you to look at it and identify it and say whether or not it bears your signature?

A. Yes, it does.

Q. That bears the date of the 20th of June, 1910?

A. Yes, sir.

Q. In connection with your testimony in answer

(Testimony of Simon Mettler.)

to Mr. Peterson's question yesterday as to whether or not any previous arrangement or agreement had been entered into, either you or the Wells Construction Company and Peter Sandberg, previous, do you understand me, to your going to Vancouver, and having those transactions in regard to this bond here, will you be kind enough to tell me how it came, in view of your answer that there was no such arrangement, that that agreement was executed?

Mr. PETERSON.—If the Court please, defendants object on the ground that it is really not proper cross-examination.

The COURT.—(Addressing the witness.) I take it you are of foreign birth. Were you born in this country?

A. No, sir, I am of foreign birth. [176]

The COURT.—All of these complicated involved questions constantly put the witness at a disadvantage. When you can, ask single questions and get his answer.

Mr. BRISTOL.—I bow to your Honor's suggestion, and think that the witness has shown himself very resourceful in this matter. He testified that there were no arrangements between himself and the Wells Construction Company relative to the giving of this indemnity agreement. Now, we have disclosed two agreements, and I submit these to the Court. I ask to have this last one identified and offer it in evidence as Plaintiff's Exhibit No. 10.

Mr. PETERSON.—The defendant Matilda Sandberg objects on the ground that it is incompetent,

(Testimony of Simon Mettler.)

irrelevant and immaterial and tends to prove no issue in this case.

Objection overruled. Exception allowed.

The WITNESS.—I will state, if I am allowed, why it came about that I testified that way, because I really never remembered any more that this particular agreement was in existence. That is nearly five years ago.”

Thereupon Defendants’ Exhibit No. 10, as follows:

Plaintiff’s Exhibit No. 10—Agreement, June 20, 1910, Between Wells Construction Co. and Peter Sandberg.

“AGREEMENT.

THIS AGREEMENT made and entered into this 20th day of June, 1910, between the Wells Construction Company, a corporation, of Tacoma, Washington, and Peter Sandberg of the same place,

WITNESSETH: That whereas the Wells Construction Company has heretofore on the —— day of ——, 1910, entered into a contract with the Powell River Company of Vancouver, B. C., for the construction of a dam and canal on the Powell River, B. C., for a price approximating \$175,000 and

Whereas the said Wells Construction Company has made application to the American Surety Company of New York to become surety on the bond of the said Wells Construction Company in the sum of \$25,000 for the faithful performance by the said Wells Construction Company of the conditions of the said contract, and

Whereas the said American Surety Company of New York refuses [177] to become surety upon the said bond of the said Wells Construction Company without some other person signing the application with the said Wells Construction Company for the said surety company to become surety upon the said bond, and

Whereas the said Peter Sandberg of Tacoma, Washington, has agreed to sign his name with the said Wells Construction Company on the application for the said bond agreeing to indemnify the said surety company in case it should be held liable on the said bond,

Now, Therefore, in consideration of the said Peter Sandberg signing the said application with the said Wells Construction Company for the said surety company to become surety upon the said bond, the said Wells Construction Company agrees to re-pay to the said Peter Sandberg any money or moneys which he may be required to pay to the said American Surety Company of New York by reason of his signing the said application with the said Wells Construction Company for the said surety Company to become surety upon the said bond and to hold the said Peter Sandberg harmless by reason of his signing the aforesaid application.

WELLS CONSTRUCTION COMPANY.

By SIMON METTLER,

President.

By JOE WELLS,

Secretary.

(Testimony of Simon Mettler.)

We individually agree to hold said Peter Sandberg harmless by reason of signing said application for a bond above mentioned.

SIMON METTLER.

JOE WELLS."

Was over the objection of defendant, Matilda Sandberg, that it was incompetent, irrelevant and immaterial, admitted in evidence.

Thereupon the witness was asked this question:

"Mr. BRISTOL.—Q. You remember I remarked to you last night after the court adjourned that I assumed you were mistaken, and I thought you were mistaken when you testified. There was no other disposition then to get at the real facts. Now, you may make any explanation you please? [178]

A. You see, when I went broke and threw up the sponge, I went away. That was nearly five years ago, and I gave it all up. I did not care where the money went that I had accumulated. You know how a man feels. That is an awful recollection to put into my mind. You know how a fellow feels.

Q. Now, will you be kind enough, Mr. Mettler, showing you Plaintiff's Exhibit No. 10, under date of June 20, 1910, to tell me to the best of your recollection where and the circumstances under which that was executed?

Mr. PETERSON.—I submit if the Court please that the agreement speaks for itself.

Mr. BRISTOL.—I am not trying to do anything with the agreement.

Objection overruled. Exception allowed.

(Testimony of Simon Mettler.)

A. I could not recall anything except that I signed it.

Q. Do you remember where and the circumstances under which you signed it?

A. Why, not any more than this instrument shows itself.

Q. Whose office were you in, if anybody's?

A. I could not remember that.

Q. Who if anybody brought the agreement to you to sign it, or did you go and get it?

A. Oh, I presume we were all together.

Q. Who? A. Mr. Wells and myself.

Q. Who else? A. And Mr. Sandberg.

Q. And who else? A. I could not tell you.

Q. Nobody but you three?

A. I am not quite positive, but I think Mr. Lund drew this agreement.

Q. Who was Mr. Lund, please?

A. Mr. Lund was a member of our company.

Q. He was a member of the Wells Construction Company? A. Yes. [179]

Q. What office did he hold, please, if you recall?

A. I am not positive whether— (interrupted).

Q. Is this the Mr. Lund you mean (indicating)?

A. That is the gentleman.

Q. The lawyer Lund, you mean? A. Correct.

Q. He is the one who brought that agreement to you to sign?

A. Somebody must have drawn it; I think it was him.

Q. Do you recall whether it was in his office that

(Testimony of Simon Mettler.)

you signed it? A. That I could not say.

Q. Or Mr. Sandberg's office?

A. Well, it was somewhere in Tacoma I presume. It is dated here.

Q. Well, all you recall about it is what you have said? A. Yes, sir."

Thereupon the witness was asked this question:

"Q. I show you Exhibit 9 dated the 26th day of November, and ask you the same question, where and in whose presence did you sign that agreement, if you recall?

Mr. PETERSON.—Defendants object on the grounds that it is not proper cross-examination, incompetent, irrelevant and immaterial.

Objection overruled. Exception allowed.

A. Well, this is one of the things that I do not remember so clearly.

Q. Will you please look at the signatures on that paper and I will call your attention to the fact that on the last sheet where the signatures are and above yours and Mr. Sandberg's are the signatures of the officers of the Wells Construction Company at that time, Mr. Charles T. Peterson as president and Mr. Newton Peer, and I will ask you whether you signed your name at that time, if you recall now, in their presence, or whether you signed it some time later, or what the circumstances were?

A. I presume I signed it right then and there.

Q. Was Mr. Sandberg present?

A. Why, I think he was."

The circumstances leading up to the conveyance of

(Testimony of Simon Mettler.)

the property [180] referred to in the agreement, Exhibit 9, were about as follows:

The Wells Construction Company wanted to get some money from a bank at Vancouver, and got Mr. Sandberg to go with us to endorse the notes. Mr. Dewar, the manager of the bank at Vancouver, said to Mr. Sandberg, "Why don't you get some surety for putting your name on those notes." Sandberg said, "No, I would rather for you to get the security." The bank let us have \$25,000, and previously loaned the company \$10,000. It was understood that we were to come back and execute deeds of the Wells Construction Company to the Bank of Vancouver. We executed a couple of deeds in blank, and returned to Vancouver. In the meantime, Mr. Dewar consulted his lawyer, and when we brought the deeds to the bank, said that the bank could not take them as it was not safe for an alien to hold property in the State of Washington. Mr. Dewar suggested that the deeds be made to Mr. Sandberg individually because he said he looked to Mr. Sandberg to get the money. Mr. Sandberg says, "No, I do not want any property from those people in my name, we can put it in the name of the Kentucky Liquor Company, to protect the bank, and I think that was done.

These two written agreements, Exhibits 9 and 10, are the only agreements I ever entered into with Mr. Sandberg to obtain his signature to the Surety Company, and I never agreed with him orally, to give him anything. Mr. Sandberg was interested in the

(Testimony of Simon Mettler.)

Kentucky Liquor Company so far as I knew. The property of Wells Construction Company was not to be conveyed as security for the Molson's Bank, but was for the express purpose of protecting the Bank of Vancouver.

Testimony of H. P. Burdick, for Defendants.

Thereupon H. P. BURDICK testified that he was an attorney, practicing at Tacoma, Washington, during the years 1910 and 1911, and was the attorney for the Mettlers in the action brought by Peter Sandberg against Simon Mettler and his wife, and Carl Mettler, to enforce an oral agreement in regard to certain real property in [181] Pierce County, Washington, being the action referred to in Exhibit No. 7.

At the time the Simon Mettler bankruptcy was closed in the Federal Court, I had an agreement with Mr. Peterson, attorney for the trustee, that the case of Sandberg against Mettler should be dismissed, and the *lis pendens* discharged, and the entire matter wiped out. That agreement was carried out by the exchange of deeds. Shortly after that suit was brought, a petition in bankruptcy was filed against the Mettlers, and the suit was abandoned.

In answer to the question whether that agreement was carried out, the witness answered:

"Yes, so far as the bankruptcy case was concerned, that was finally closed up and deeds exchanged between Carl Mettler and the Molson's Bank of Vancouver, B. C., and the Bank of Vancouver, as well,

(Testimony of H. P. Burdick.)

and there was a petition in bankruptcy afterwards filed against Simon Mettler.”

But the witness did not know whether formal order of dismissal had ever been entered.

Testimony of Peter Sandberg, in His Own Behalf.

Thereupon PETER SANDBERG testified in person as follows:

That he was never a stockholder in the Wells Construction Company and had no interest in it, either directly or indirectly, and did not participate in any way in the profits of the company, and thereupon the witness was asked the following questions, the following objections were made and the following rulings made by the Court and the following exceptions taken:

“Q. Did you participate in any way in any of the profits of the corporation?

Mr. BRISTOL.—Your Honor understands, I take it, that of course, under the state of the pleadings here and the points already submitted to your Honor, that this testimony raises this legal point: We are maintaining for the plaintiff, that the witness himself, the defendant, cannot be permitted [182] in view of its agreement with us to testify orally in contradiction thereto, and I understand the Court expressed himself that while he understood that point the evidence will be allowed to go in until the final argument. We are objecting to this testimony on the ground that he cannot be heard now, give any testimony against that agreement plead in the pleadings, and in our reply, which was

(Testimony of Peter Sandberg.)

part of our indemnity agreement with him, and that that estoppel runs against the defendant Matilda Sandberg as well as himself.

The COURT.—The objection will be overruled and final determination reserved until the final argument.

Exception allowed.

Mr. PETERSON.—“Mr. Sandberg, did you ever receive any property or any consideration from Simon Mettler or Joseph Wells or the Wells Construction Company or anybody—(interrupted).

A. No, sir.

Q. Just a minute—for your executing and affixing your name to Plaintiff’s Exhibit 2, being an indemnity agreement with the American Surety Company?

Mr. BRISTOL.—Now, at this time I object to this testimony further on the ground that it cannot be received and is incompetent for the reason that Exhibits 9 and 10 are written documents and speak for themselves, to which this witness himself was a party, and confessedly acting in connection with the community at the time, and that he cannot be heard to state anything on this witness-stand verbally in modification of or denial or alteration thereof.

The COURT.—Same ruling. Exception allowed.

Mr. BRISTOL.—And in order not to interrupt the Court again, allow me a motion to strike out such testimony as you elicited from Mr. Sandberg previous to my objection.

(Testimony of Peter Sandberg.)

The COURT.—Motion denied; exception allowed.

A. No, sir.”

Thereupon the witness was asked the following questions:

“Mr. PETERSON.—Q. Mr. Sandberg, calling your attention to the operations of the Wells Construction Company in Vancouver, I will ask you whether or not you were present at the **Bank of Vancouver** in British Columbia in company with Simon Mettler and others connected with the Wells Construction Company regarding the endorsement of some notes of the Wells Construction Company in the latter part of 1910?

A. In the bank of Vancouver?

Q. Yes. A. Yes. [183]

Q. Mr. Sandberg, you may state whether or not any conversation took place at the bank regarding the conveyance by the Wells Construction Company and Vergowe of certain property held by them as indemnity or collateral security?

A. Well, I went up there with Mettler. Mettler asked me to go up there and I went into the bank and he wanted to borrow some money up there, the Wells Construction Company wanted to borrow some money up there, and it was a very small bank. They said they could not loan any money; they had just started the bank, and they said they did not like to loan them any money without collateral security, so the Wells Construction Company, Mettler and Joe Wells and Vergowe said they had some property belonging to the Wells Construction Company, and

(Testimony of Peter Sandberg.)

also Joe Wells and Vergowe had property of their own, and Dewar insisted upon having some deeds to that property, and told them to have some deeds made out, and they had the deeds made out in blank, and they went up there and turned the property over to Dewar—to the Bank of Vancouver—and he had been consulting his attorney up there, and he said they did not like to hold any property in this State in their own name, so he said to me, ‘You had better hold that property in your name in trust for us,’ and I said I did not want to do that. He said, ‘Why,’ and I said, ‘Why, if that property has to be conveyed, I will have to go to my wife and sign those deeds over. I do not want to do it,’ I says. I says, ‘put it in anybody else’s name,’ and so he said, ‘Well, any one you know who will hold it for us is all right,’ so I said, ‘You can take it in the name of the Kentucky Liquor Company,’ and that was understood, and their bookkeeper—Frank Latcham was the notary on these deeds, but he could not do it up there, so he brought the deeds back here and filled in the name of the Kentucky Liquor Company as trustee for the Bank of Vancouver, and it was recorded. Then later on Dewar—some objection was made to the Kentucky Liquor Company holding that property, being it was a corporation, and that they could not hold the property in trust for the bank, and I think that matter was discussed in your office and I do not remember if Dewar was there or who was there, so the property was transferred to Elmer Hayden of Hayden & Langhorne of this city for the

(Testimony of Peter Sandberg.)

bank, and then later on the bank foreclosed on the property and disposed of the property.

Q. Now, Mr. Sandberg, you may state whether or not all of this property, if you know, was conveyed to Mr. Hayden by the Kentucky Liquor Company?

A. Yes, every piece of it.

Q. I mean all of the property described in Plaintiff's Exhibit 9?

A. Every bit of property the Kentucky Liquor Company had in trust for the bank was signed over to him.

Mr. BRISTOL.—That is to Mr. Hayden as successor, as trustee?

Mr. PETERSON.—Yes.

Mr. BRISTOL.—About when was that? [184]

Mr. PETERSON.—That was about a month or two, and I think—(interrupted).

Mr. BRISTOL.—Sometime about the first of the year 1911.

Mr. PETERSON.—That is my recollection of it.

Mr. BRISTOL.—Since that time the trustee went on and foreclosed for the parties and distributed the stuff.

Mr. PETERSON.—Mr. Hayden went along and foreclosed for the bank there alone.

Q. Now, Mr. Sandberg, did you get any of that property?

Mr. BRISTOL.—I object to that on the ground that it is immaterial.

Objection overruled. Exception allowed.

A. No, sir.

(Testimony of Peter Sandberg.)

Q. Did you get any proceeds of it in that foreclosure suit? A. No, sir.

Q. Did you ever have possession of any of that property? A. No, sir.

Q. Did you ever get any profits out of it in any shape, form or manner?

Mr. BRISTOL.—I object to that.

Objection overruled. Exception allowed.

A. No, sir.

Q. Did the Kentucky Liquor Company ever get any property or proceeds out of the property?

Mr. BRISTOL.—Same objection.

The COURT.—Same ruling. Exception allowed.

A. No, sir.

Q. Who finally took all of that property under that arrangement that was made there, the deeds?

A. Elmer Hayden.

Mr. BRISTOL.—I do not know whether I am making myself clear or how sure that my point is right. I direct the Court's attention respectfully to this proposition of law: The Supreme Court of the State of Washington holds in a long line of cases that it is quite immaterial whether there are any proceeds or profits or results of any kind received by the community or by the individuals composing it, and that being a rule of property, I understand under the list of cases to be the rule of property [185] in this court, and therefore it is immaterial and incompetent whether Mr. Sandberg received any proceeds, profits or benefits of any kind.

The COURT.—I am clear upon that, but it is not

(Testimony of Peter Sandberg.)

clear that this would be the only effect of his evidence. Objection overruled; exception allowed."

At the time I married Mrs. Sandberg, I had two small cottages, worth about \$1,000. There was a \$600 mortgage on them. All of the property described in *Mr. Sandberg's* answer was acquired by us since we were married. I never inherited any property, nobody ever gave me any. I acquired the property at different times by purchase. I sold the two lots on I Street, and spent the money, never keeping any separate account of it.

On cross-examination this witness testified that the contract Mr. Peterson introduced in evidence designated as Defendant's Exhibit "A," speaking of the witness himself, comprehended the building and property known as the Kentucky Building in Block 1104, Lot 13, Tacoma, and was part of the community business witness and his wife had always been conducting; that Mr. Peterson and Mr. Peer became president and secretary of the Wells Construction Company about the time of the execution of the instrument, Exhibit 9, November 26, 1910, and that Mr. Newton Peer and Major Bates had been his attorneys for practically twenty-five years, and that the witness recalled that the agreement of November 26, 1910, was talked over two or three days before when he was present; that the officers of the Wells Construction Company resigned; that Mr. Peter and Mr. Peterson did not take over the contract of the Wells Construction Company for him; that he was up *on* Vancouver three or four times and that

(Testimony of Peter Sandberg.)

the last trip was the November 26th trip; that the stock of the Wells Construction Company was turned over to Peer and Peterson at the time the instrument was made and that it may have been talked over three or four days before to get themselves organized and then the stock was turned over because witness [186] remembered particularly that Mr. Lund was up in the office of the building known as the Kentucky Building at the time where the Wells Construction Company had their office; that Mr. Lund turned over his share to Joe Wells and Vergowe and Mettler turned over their stock to Peterson and Peer as trustee for the Wells Construction Company, and the witness knew it was two or three days prior to the agreement of November 26th. The witnesses attention was called to the complaint in the action of Sandberg vs. Mettler, Exhibit 7, and asked how it came about that that suit was begun. He testified, 'I will tell you how that came about from the beginning. I went up to Molson's Bank in Vancouver with Vergowe, Mettler and Wells. They wanted to borrow \$55,000, on the Powell River work. They already had fifteen or twenty thousand dollars, and Mr. Campbell, the manager of the bank, said, 'We cannot give you people any more money.' Mr. Mettler said, 'I am perfectly good for it myself.' I have a list of property here, which I handed to Mr. Campbell, and said, I will sign over some deed to secure the bank, or any indebtedness I make here. He mentioned the St. Elmo hotel on Puyallup Ave., and a few other pieces worth quite a bit of money. He

(Testimony of Peter Sandberg.)

agreed, on his return to Tacoma, to make out a deed or deeds to some of the property, as security for the sixty-five or seventy thousand dollars, so I endorsed the note. Mr. Campbell came down to Tacoma two or three weeks afterwards, and insisted on Mettler making out those deeds to the bank. He went and sold the St. Elmo hotel property and started to transfer the other property. Mr. Campbell went to Bates, Peer & Petersons' office, and insisted on filing suit against Simon Mettler and Carl Mettler to stop them getting rid of the property. He insisted on me bringing the suit. That is the way the suit was brought. Afterwards it was fixed up some way, I don't know just how. Simon Mettler never did deed this property to anybody. [187]

Testimony of George E. Vergowe, for Defendants.

GEORGE E. VERGOWE was then called as a witness, and testified that he was at the bank of Vancouver at the time the \$25,000 loan was obtained by the Wells Construction Company, and the manager of the bank spoke about having the Wells Construction Company and Joe Wells and myself turn over some property as security. We had the thing arranged, and made blank deeds, and took them to the bank. The bank learned that it could not hold the property so it wanted Sandberg to take it in his name, and he did not want to take it, so it was agreed it should be turned over to the Kentucky Liquor Company, and that was done. I executed a deed to forty acres, and there was nothing said at that time regarding the conveying of the property to secure any-

(Testimony of George E. Vergowe.)

body else than the Bank of Vancouver. I knew all about the property of the Wells Construction Company. Mr. Mettler, myself and my brother-in-law owned it before *the was* organized. We deeded it to the Wells Construction Company, and it was all deeded to the Kentucky Liquor Company. On the 26th of November, 1910, we turned over our stock in the Wells Construction Company to Peer and Peterson. I don't know how it happened that the Molson's Bank appears in the agreement of November 26, 1910.

Testimony of Charles T. Peterson, for Defendants.

CHARLES T. PETERSON, attorney for the defendants, then offered himself as a witness and testified about the transactions with Mr. Hayden as successor trustee; that he had personal charge of the affairs of the bank of Vancouver in connection with the matter testified to by the previous witness and was also attorney in the bankruptcy proceedings for the Molson Bank; and thereupon witness identified paper in bankruptcy in this court numbered 885, of Simon Mettler and the same was marked and received in evidence as plaintiff's Exhibit number 11.

Thereupon the instrument signed by Peter Sandberg on the 19th day of October, 1910, was shown witness and the following questions [188] were asked and the following objections made and the following ruling of the Court given and exceptions allowed:

“Q. Mr. Peterson, was that a part of the transaction of which Plaintiff's Exhibit 9 was originally a

(Testimony of Charles T. Peterson.)

part relative to the transaction between the two banks the Bank of Vancouver concerning which transaction Mr. Bates asked you about, and the Molson's Bank, concerned with the transactions of the Wells Construction Company?

Mr. BATES.—I object to that as not proper cross-examination.

Objection sustained. Exception allowed.

Mr. BRISTOL.—Q. In connection with the transaction which Mr. Bates asked you about, concerned with the Bank of Vancouver, is it not a fact, Mr. Peterson, that the agreement or instrument in this petition, Exhibit No. 11, is a very part of the same transaction as the instrument No. 9, so far as the trusteeship is concerned?

Mr. BATES.—I object to that as not proper cross-examination.

Objection sustained. Exception allowed.

Mr. BRISTOL.—Q. You may state whether or not Mr. Peterson, the property in Defendants' Exhibit "E," marked for identification, is not to your personal knowledge the same property in the draft of the instrument from your office, Plaintiff's Exhibit No. 9? A. It appears to be.

Mr. BATES.—I object to that as not proper cross-examination.

The COURT.—Are you asking now about the contents of the identification which is not in evidence?

Mr. BRISTOL.—I am asking about the similarity of that paper which he identified before the witness, with a paper which is in evidence, in order to con-

(Testimony of Charles T. Peterson.)

nect them up in such manner, that in view of the identified exhibit being withheld, it may appear clear, the effect of the evidence in this cause.

Mr. BATES.—He is examining him about an instrument which is not in evidence.

Objection overruled.

Mr. BRISTOL.—Q. When you prepared the verification of claim for the Bank of Vancouver, you had the knowledge, did you not, of the agreement of November 26, 1910, Plaintiff's Exhibit No. 9, and of this petition which you had filed for the Molson's Bank, Plaintiff's Exhibit No. 11? A. Yes, sir.

The WITNESS.—I want to state something further in this connection. I found upon investigation, prior to the filing of any of these papers, that the Molson's Bank and Peter [189] Sandberg had no interest in the property described in Plaintiff's Exhibit No. 9, notwithstanding the instrument's recitals.

Mr. BRISTOL.—I object to that and move to have it stricken out on the ground that it is deliberate verbal evidence affecting the terms of a written instrument which purports to have verity upon its face.

Objection overruled. Motion denied. Exception allowed.

The WITNESS.—After consulting Mr. E. M. Hayden, as trustee for the Bank of Vancouver, the petition and intervention of the Bank of Vancouver was filed, setting forth the recitals contained therein to the effect that it did have and hold certain securities, describing this property."

Testimony of F. M. Harshberger, for Defendants.

Thereupon F. M. Harshberger was called as a witness upon the part of the defendants to identify certain papers which were introduced in evidence as Defendants' Exhibit "E."

Testimony of R. H. Lund, for Plaintiff (In Rebuttal).

Thereupon R. H. LUND was called in rebuttal as a witness upon the part of the plaintiff and testified that he was a lawyer, been in Tacoma over twenty-four years, knew Peter Sandberg, Joe Wells, Simon Mettler, Vergowe and the Wells Construction Company; that he was the holder of one share of stock in the Wells Construction Company and held position of secretary for a considerable period of time up until the latter part of October or early in November, 1910. Upon being asked what was the occasion of giving up his connection he testified:

"A. It was at a meeting of the stockholders of the Wells Construction Company held in the Kentucky Building on Pacific Avenue during the latter part of October or early in November, 1910. The meeting was called for the purpose of considering the financial ability of the Wells Construction Company to continue its work, its contracts in British Columbia, and in fact to give up any further attempt to continue those contracts, which resulted in the resignation of the officers, the assignment in blank of our various certificates of stock, which were at that time turned over to Mr. Sandberg, or rather to Mr. Peterson, being there as attorney for Mr. Sandberg.

(Testimony of R. H. Lund.)

Q. At that meeting? A. Yes, sir.

Q. And that severed your relationship at that time? [190] A. Yes, sir."

Thereupon the witness testified that he had had occasion to meet and confer with Joseph Wells concerning transactions of Wells Construction Company, and that Joe Wells was general manager and had charge of the work and that he had had occasion to talk to Joe Wells concerning the transactions of Wells Construction Company with Peter Sandberg during the year 1910 and that the conversation took place in the Kentucky Building and also up at his office in the Bernice Building; and thereupon the witness was asked this question:

"Q. And may I ask you please if during that conversation Joe Wells stated to you, concerning the transactions between Peter Sandberg and the Wells Construction Company, how much, if any, was owing from Peter Sandberg to the Wells Construction Company for work done by the Wells Construction Company for Peter Sandberg on the Kentucky Building, or upon the building adjoining the Kentucky Building, described here in Defendants' Exhibit 'A'?

Mr. BATES.—I object to that as entirely incompetent and irrelevant and not proper rebuttal, and for the further reason that no foundation has been laid for this question. If it can be anything at all it must be for the purpose of impeachment.

The COURT.—Objection sustained. You have had Mr. Wells on the stand.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—It is not impeachment.

The COURT.—It is nothing else; the objection will be sustained. Exception allowed.

Mr. BRISTOL.—Q. Did you ascertain in any manner yourself how much Peter Sandberg owed the Wells Construction Company for the construction of the building that the Wells Construction Company was putting up for Peter Sandberg in 1910?

A. Yes, sir.

Mr. BATES.—I object to that as incompetent, irrelevant and immaterial and not proper rebuttal.

The COURT.—Objection sustained. You can ask him if he knows.

Mr. BRISTOL.—Q. I will ask you if you know.

A. Then I will have to modify my answer.

Q. Answer what the facts are.

A. I know from statements made to me by Mr. Wells and Mr. [191] Vergowe and Mr. Mettler and up until the 12th day of February, 1910, from the accounts and books kept of that contract.

Q. Now, you may state from all of those sources of knowledge what Peter Sandberg was owing to the Wells Construction Company in 1910, on or about approximately the time you had this meeting in the Kentucky Building, there was owing from Peter Sandberg to the Wells Construction Company?

Mr. BATES.—I object to that as incompetent and purely hearsay.

The COURT.—It is not purely hearsay, but as long as it permits an answer that may involve hearsay, the objection is sustained.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—It appears from the evidence of Mr. Vergowe and Mr. Mettler and Mr. Wells, officers of this company, you have allowed statements from them to be put in here. Does your Honor hold that their statements of the accounts to one of their own coadjutors in the building is not material?

The COURT.—No, sir, I do not hold it is not material, but I do hold that before you can bring in impeaching evidence—(interrupted).

Mr. BRISTOL.—This is not impeaching testimony.

The COURT.—I have held that it was. Objection overruled. Exception allowed.

Mr. BRISTOL.—Q. What office did you hold in this company at the time? A. Secretary.

Q. And were you not also its attorney?

A. Yes, sir.

Q. You continued in that relationship until this meeting when you transferred your stock?

A. Yes, sir.

Q. Now state, if you please, whether in your capacity as secretary and attorney, you knew how much Peter Sandberg owed the Wells Construction Company on and after June, 1910, and up to the time that your relations with the company ceased?

A. I did know.

Q. Will you please state what you did know?

Mr. BATES.—Before he answers that I would like to ask him if he did not know only by what he had been told by other officers of the company.

(Testimony of R. H. Lund.)

The COURT.—You may cross-examine.

Mr. BATES.—Q. Isn't that a fact?

A. As I said before, yes, sir.

Mr. BATES.—Then I object to that on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. BRISTOL.—You allowed Joseph Wells, over my objection, in the absence of the production of the books of that accounting, to testify by word of mouth of what those books contained, as to his knowledge of them, and coupled with that, they put in their statements in this court of the amounts that were deducted from Peter Sandberg in his account with the Wells Construction Company, and then what was deducted from the Wells Construction Company account with Peter Sandberg, the other way around. Now, here is an officer of the Wells Construction Company, secretary and attorney, proved to be in that relationship up until this transfer was made, and he says that he does know, and I have asked him for the amount of that indebtedness. Do I understand your Honor to rule that he cannot answer?

The COURT.—The Court held that as a preliminary the *prima facie* showing was sufficient to let in secondary evidence. It may be that you can convince the Court that there are some suspicious circumstances surrounding the disposition, but so far as the accounts admitted were concerned, they came so nearly being accounts stated that the Court let them in because they might appear to be part of the *res gestae*. Now, Mr. Wells stated positively what

(Testimony of R. H. Lund.)

his recollection was, so I did not require that he try to tell what was on the books. So far as Mr. and Mrs. Sandberg are concerned, Mr. Wells was a witness. If you can show that Mr. or Mrs. Sandberg have made any statements or anything inconsistent with what they testified to you may be given the benefit of that. So far as Mr. Wells is concerned, he is a witness for them.

Objection sustained. Exception allowed.

Mr. BRISTOL.—It is not impeaching testimony. My purpose—(interrupted).

The COURT.—The Court is not concerned with your purpose of it, it is the legal effect of it.

Mr. BRISTOL.—In order to save my record, I will offer to show by this witness that George Vergowe, Simon Mettler, and Joe Wells, the business transactions he had with them, and from his own relations, both as secretary and attorney, and up to and including the time that he severed his relationship with them in the fore part of November, he became acquainted with and knew the amount claimed by the Wells Construction Company from Peter Sandberg, how much approximately Peter Sandberg owed the Wells Construction Company, and can state such amount, and I will ask permission to show that amount by this witness. [193]

The COURT.—Understanding that his source of information is oral statements made by Joseph Wells in the absence of the defendants, the offer is denied.

Exception allowed.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—Q. Now, can you state of your own knowledge whether or not Peter Sandberg owed the Wells Construction Company any money whatever after June, 1910, and up to the time your relations as secretary and attorney with the Wells Construction Company ceased?

A. I can state—(interrupted).

Mr. PETERSON.—We submit that can be answered yes or no.

A. What is the question?

(Question read.)

A. I can only do so from information I received as stated before.

Mr. BRISTOL.—Q. Well, that information gave you knowledge, didn't it? A. Yes, sir.

Q. I will ask you to state what your knowledge is as to the amount of that indebtedness.

Mr. BATES.—We object to that.

Objection sustained. Exception allowed."

Thereupon the witness was asked if he had any recollection of meeting Peter Sandberg in his office concerning the matter of Simon Mettler turning back notes against the Wells Construction Company and he answered that he had and said that that was at the time he testified to before the time that the stock was turned over to Mr. Sandberg and at the same meeting.

Thereupon witness identified the complaint in the case of Wells Construction Company against Joseph Wells for an accounting and the same was admitted

(Testimony of R. H. Lund.)

and received in evidence and marked Plaintiff's Exhibit No. 12.

On cross-examination this witness was examined and testified as follows:

"Q. Mr. Lund, you were the attorney for the Molson's Bank in [194] a case tried up in the Superior Court a couple of months ago?

A. In a very insignificant way, Mr. Peterson.

Q. Well, you had been up to Vancouver rustling around in connection with that matter?

A. No, sir.

Q. You testified in that case? A. Yes, sir.

Q. You did not state in that action up there, did you, that the stock was transferred to Peer & Peterson in trust for Mr. Sandberg? A. No, sir.

Q. You were interested with those gentlemen in the trial of that case?

A. I was interested with Mr. Ballinger and his firm; yes, sir.

Q. You have been practicing law here a good many years? A. Yes, sir.

Q. You knew the law applicable to community property in this state fairly well? A. Yes, sir.

Q. You know that if a man is a stockholder in a corporation that—(interrupted).

Mr. BRISTOL.—I submit that is not proper cross-examination.

Objection sustained.

Mr. PETERSON.—It is leading up to his statement as being inconsistent with these statements now. I am simply showing his qualifications.

(Testimony of R. H. Lund.)

Objection sustained. Exception allowed.

Mr. PETERSON.—Q. Why is it that in that action you did not testify that this stock was turned over by the parties interested to Mr. Peer and myself in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that upon the ground that there is no testimony of that kind submitted to the witness, and counsel's statement of such testimony does not make it so, and the record in that case is the best evidence.

Objection overruled. Exception allowed.

A. What is the question? [195]

Q. Why was it you did not testify in that case that this stock was turned over by those parties to Peer & Peterson in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that on the ground he has not testified in that case any different than he has testified in this case. He testified here before this Court that that stock was turned over to you after that meeting for Mr. Sandberg, and I do not know what he testified in the other case, and I object until I see the record.

The COURT.—Objection overruled. As I have got the witness' testimony, the testimony was that the stock was turned over to Peer & Peterson in this meeting, and then you described them further as attorneys for Peter Sandberg.

The WITNESS.—I have no recollection of testifying to that here.

Mr. BRISTOL.—He testified that it was turned over to Peter Sandberg in this court.

(Testimony of R. H. Lund.)

The COURT.—If he says that he did not say that, I will have to disregard it.

The WITNESS.—I can say as I say now, as my only remembrance of that occurrence, that the stock was turned over to Peter Sandberg, but the final delivery was made to you as attorney for Peter Sandberg.

Mr. PETERSON.—Q. That is your conclusion of the matter?

A. That is my conclusion and my best recollection of what occurred four or five years ago. I was there and you were there.”

Thereupon witness identified a share of stock, Defendants' Exhibit “F,” being one share of the company stock of the Wells Construction Company of the par value of one hundred (\$100) dollars, issued to R. H. Lund, and assigned, November 26, 1910, by R. H. Lund to Joe Wells, which was received and offered in evidence, over the objection of the plaintiff that the same was immaterial, irrelevant and not tending to prove any fact at issue in the case.

The Court then directed that the record show that during the examination of this witness Lund, Wells and Vergowe, witnesses for the defendants, remained in the courtroom.

And the plaintiff requested of the Court findings of fact and conclusions of law; but the Court made its own findings of fact and conclusions of law as all elsewhere appear of record in this cause. [196]

Order Settling and Allowing Bill of Exceptions.

BE IT KNOWN that on this 10th day of February, 1917, within the time limited therefor by law and the order of this Court, there was presented to us, the Judge before whom this cause was tried, the foregoing bill of exceptions, and with it due proof of service thereof upon the defendants' attorneys, and application having been made to have such bill of exceptions settled, allowed and signed, and the Court now having fully considered said bill of exceptions and being satisfied of our own knowledge that the same contains a true and complete record of all the proceedings had upon the trial of said cause from the time the same was called for trial to the entry of final judgment therein, including a true transcript of all of the evidence admitted upon the trial, a full, true and correct statement of all evidence tendered to and excluded by the Court and of all the objections made to the admission of evidence and of all of the rulings of the Court thereon and the exceptions thereto, of all exceptions then and there taken upon the trial to all of the rulings of the Court, and of all other matters which occurred upon the trial of said cause, including all of the testimony of the various witnesses and the exhibits in connection therewith, and being fully advised in the premises,

THE COURT SETTLES, SIGNS AND ALLOWS said bill of exceptions and hereby makes the said several matters and things therein contained a part of the record in this cause.

Dated and settled this 10th day of February, 1917.

EDWARD E. CUSHMAN,

District Judge. [197]

Proposed Bill of Exceptions Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Sep. 16, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Bill of Exceptions as Settled and Certified. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 10, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [198]

Petition for Writ of Error.

The above-named plaintiff, American Surety Company of New York, respectfully shows and represents:

That on or about the 13th day of June, 1916, the above-entitled Court entered a judgment in this cause in favor of the defendant Mathilda Sandberg, and against this plaintiff, and adjudged that the community estate was in nowise liable for the demands of the plaintiff, in which judgment and adjudication and the proceedings here prior thereunto in this cause certain errors were by the Court committed to the prejudice of this plaintiff that in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, American Surety Company of New York prays that a writ of error may issue in this behalf out of the United States Circuit Court of Ap-

peals for the Ninth Circuit for the correction of the errors and adjudications so complained of and that a transcript of the record, proceedings and papers in this cause, together with the original exhibits duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW
YORK,

By WILLIAM C. BRISTOL,
Attorney.

Filed in the U. S. District Court, Western Dist.
of Washington, Southern Division, Dec. 11, 1916.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [199]

**Assignments of Errors Accompanying Petition for
Writ of Error.**

The above-named plaintiff, in connection with its petition for writ of error, makes the following assignments of errors which it avers occurred upon the trial of the cause, to wit:

First. That the Court erred in denying the motion to strike out as particularly referred to in the motion those certain parts of paragraphs I, IV, V, VI and III of the answer of both defendants made jointly in said cause, and in deciding in its opinion filed herein July 31, 1915, as if and upon the ground that no such motion was made in the cause.

Second. That the Court erred in refusing to enforce the estoppel pleaded in the reply of the plaintiff.

Third. That the Court erred in rejecting evidence of the knowledge of Mathilda Sandberg of the construction of the building and the payments therefor by her husband for the community estate, and the Court erred in that respect further in sustaining objection to the evidence of Mathilda Sandberg upon the point of her knowledge of the work being done on the Kentucky Building and of her husband paying therefor out of the community funds, and in that respect erred in sustaining the objection to the question "You naturally knew that your husband would have to make payments on that building contract?" [200]

Fourth. That the Court erred in rejecting the evidence of Mathilda Sandberg upon the admissions made in the interrogatories introduced in evidence and designated and marked Plaintiff's Exhibit "A."

Fifth. That the Court erred in its ruling as follows, to wit: "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing out that as my intimation of the effect of this evidence at this time," upon the subject of the evidence as to whether or not Sandberg was or was not a stockholder of Wells Construction Company and interested therein.

Sixth. That the Court erred, over the objection of the plaintiff, in allowing the following evidence to be inquired for and adduced, to wit: That counsel for the defendants put to the witness Wells, over the objection of the plaintiff, the following question: "Did you or the Wells Construction Company or anybody in its behalf ever give Mr. Sandberg anything for signing this indemnity agreement, Plaintiff's Exhibit No. 2?" To which the Court permitted the witness to answer, over the objection then made, and the witness answered: "No, sir."

Seventh. That the Court erred in the admission of the statement, Defendants' [201] Exhibit "C," in evidence and in making the ruling in regard thereto as follows: "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company I mean the manner in which he was in one sense interested in that company."

Eighth. The Court erred in receiving in evidence Defendants' Exhibit "D."

Ninth. That the Court erred in allowing the testimony on the following question to the witness Simon Mettler: "Was there anything said about the relations or business of the Wells Construction Company with Mr. Sandberg in building this building in connection with this matter?" and in receiving and applying the same to the relationship that the defendant Mathilda Sandberg as wife bore to the matter in issue and to the community.

Tenth. That the Court erred in allowing the evidence to be adduced and in receiving the evidence upon the following question: "Did Mr. Sandberg receive anything from you or the Wells Construction Company for signing this agreement?" propounded to the witness Simon Mettler and in ruling in the reception of said evidence that the main point which would have to be decided in the case was whether the wife Mathilda Sandberg is or was estopped and in refusing and failing to enforce the estoppel when the cause was decided.

Eleventh. That the Court erred in receiving the evidence from Simon [202] Mettler under the question: "Were Mr. or Mrs. Sandberg or either of them ever stockholders in that corporation?" and in ruling that the answer of the witness would amount only to a negative and that he did not know of their having been stockholders at any time and in permitting the witness to answer, over the objections made, "No, sir, they never had any stock in it"; and in likewise ruling upon the question to the same witness Simon Mettler "Were they ever interested in any way in the corporation?" and in ruling that that amounted to whether the witness knew or not, and that was all.

Twelfth. In the course of examination of the witness Simon Mettler on the subject of whether or not Vergowe, Mettler and Wells, in consideration of Peter Sandberg endorsing certain notes and bonds of Wells Construction Company to get credit with which to raise money to carry on its business, it was

agreed between them that they would convey by deeds property to fully secure and indemnify Peter Sandberg on account thereof, the Court erred in ruling when the following question was put to the witness Simon Mettler, referring to Sandberg: "Well, doesn't he tell the real truth about it?" The Court before the witness answered then said and ruled: "If this lawsuit has not been determined the witness might not be free to answer." And thereupon the witness was asked the following question: "Then Mr. Sandberg's statement in this complaint as to what the agreement was between you and Mr. Vergowe and Wells and himself was not correct, is that right?" and there then ensued a colloquy between Court and counsel, whereupon the Court erred in making this ruling and statement in respect of said matter: "Is it not true that if your position (referring to plaintiff's position) on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community. If you show Mr. Vergowe gave one [203] deed you could get as much advantage as though you brought in a bushel of deeds."

Thirteenth. That the Court erred in disregarding Plaintiff's Exhibits 9 and 10 and in refusing to give legal force and effect thereto in its decision of the cause.

Fourteenth. That the Court erred in allowing the witness Sandberg to answer the question: "Did you participate in any way in any of the profits of the corporation?" and in permitting the witness to be

further interrogated and answer as to whether or not he received any property or any consideration from Simon Mettler or Joseph Wells for executing and affixing his name to Plaintiff's Exhibit 2, being the indemnity agreement with the American Surety Company.

Fifteenth. That the Court erred in overruling the plaintiff's motion to strike out the testimony of said last witness Sandberg upon said point and in denying plaintiff's motion to eliminate said evidence.

Sixteenth. That the Court erred in allowing the witness Sandberg to answer and be interrogated: "Who finally took all of that property under that arrangement that was made there, the deeds?" and in ruling partially upon plaintiff's objection: "I am clear upon that" and in further ruling upon plaintiff's objection: "But it is not clear that this would be the only effect of his evidence" and in overruling plaintiff's objection and receiving said evidence.
[204]

Seventeenth. That the Court erred in rejecting the evidence sought to be elicited from the witness Peterson and in sustaining the objections to the questions seeking to elicit said evidence, to wit, as to whether or not the instrument signed by Peter Sandberg on the 19th day of October, 1910, as Plaintiff's Exhibit No. 11, was a part of the transaction of which Plaintiff's Exhibit 9 was a part; and the Court further erred in refusing to receive said evidence and in sustaining objections thereto and in refusing to allow plaintiff to pursue that subject; and the Court further erred in

that particular in allowing the witness to answer and to state in relation to that matter: "I found upon investigation prior to the filing of any of these papers that the Molsons Bank and Peter Sandberg had no interest in the property described in Plaintiff's Exhibit No. 9, notwithstanding the instrument's recital," and in refusing to strike out such statement of the witness and in receiving and considering the same in evidence.

Eighteenth. That the Court erred in rejecting the evidence of R. H. Lund concerning whether or not Joe Wells had stated to him about the transactions between Peter Sandberg and Wells Construction Company how much, if any, was owing from Peter Sandberg to the Wells Construction Company, and in respect of the same matter the Court erred in refusing to allow the plaintiff to ascertain from the witness Lund how much Peter Sandberg owed Wells Construction Company for the construction of the building that the Wells Construction Company was putting up for Peter Sandberg in 1910.

Nineteenth. That the witness R. H. Lund having stated that he knew from [205] statements made to him by Mr. Wells, Mr. Vergowe and Mr. Mettler and from the accounts and books kept of the contract between Sandberg and Wells Construction Company until the 12th day of February, 1910, what Peter Sandberg was owing to the Wells Construction Company and the witness Lund was asked to state from that source of knowledge what there was owing from Peter Sandberg to Wells Construction Company and the Court refused to allow the witness to

state or answer the questions on that subject on the ground that it might involve hearsay, which action of the Court was error.

Twentieth. That the Court erred in holding that the testimony offered from the witness Lund on this subject was impeaching testimony and in refusing to receive and consider the same, for that it appeared that he was secretary and attorney of the company, had *source* and access to its books and records and had and knew of the facts in the matter from conversations with Vergowe, Mettler and Wells, and the Court erred in refusing to receive or consider his evidence or allow him to answer in regard to the subject matter of what Peter Sandberg was owing the Wells Construction Company on and after June, 1910.

Twenty-first. That the Court erred in making the following ruling in respect of said matter: "The Court held that as a preliminary the *prima facie* showing was sufficient to let in secondary evidence (having reference to the books). It may be that you can convince the Court that there are some suspicious circumstances surrounding the disposition, but so far as the accounts admitted were concerned they came so nearly being accounts stated that the Court let them in [206] because that might appear to be part of the *res gestae*. Now, Mr. Wells stated positively what his recollection was, so I did not require that he try to tell what was in the books. So far as Mr. and Mrs. Sandberg are concerned, Mr. Wells was a witness. If you can show that Mr. or Mrs. Sandberg have made any statements or anything inconsistent with what they testified to, you may be given the

benefit of that. So far as Mr. Wells is concerned, he is a witness for them."

Twenty-second. The Court erred in this same connection in making the following ruling with reference to the testimony of the witness Lund and against the offer of counsel for plaintiff to show by the evidence the facts sought to be ascertained, to wit: "Understanding that his (referring to Lund) source of information is oral statements made by Joseph Wells in the presence of the defendants, the offer is denied."

Twenty-third. The Court erred in refusing to allow the witness Lund to state what his knowledge was as to the amount of that particular indebtedness.

Twenty-fourth. That the Court erred and abused judicial discretion in the course of examination of the witness Lund in the following particulars, to wit:

"Mr. PETERSON.—Q. Why is it that in that action you did not testify that this stock was turned over by the parties interested to Mr. Peer and myself in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that upon the ground that there is no testimony of that kind submitted to the witness, and counsel's statement of such testimony does not make it so, and the record in that case is the best evidence. [207]

Objection overruled. Exception allowed.

A. What is the question?

Q. Why was it you did not testify in that case that this stock was turned over by those parties to Peer & Peterson in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that on the ground he

has not testified in that case any different than he has testified in this case. He testified here before this Court that that stock was turned over to you after that meeting for Mr. Sandberg, and I do not know what he testified in the other case, and I object until I see the record.

The COURT.—Objection overruled. As I have got the witness' testimony, the testimony was that the stock was turned over to Peer and Peterson in this meeting, and then you described them further as attorneys for Peter Sandberg.

The WITNESS.—I have no recollection of testifying to that here.

Mr. BRISTOL.—He testified that it was turned over to Peter Sandberg in this court.

The COURT.—If he says that he did not say that, I will have to disregard it.

The WITNESS.—I can say as I say now, as my only remembrance of that occurrence, that the stock was turned over to Peter Sandberg, but the final delivery was made to you as attorney for Peter Sandberg.

Mr. PETERSON.—Q. That is your conclusion of the matter?

A. That is my conclusion and my best recollection of what occurred four or five years ago. I was there and you were there."

And the Court erred in refusing to consider said evidence and in ruling as it is shown by the record that the Court did in respect of said evidence and that the action of the Court in these particulars was prejudicial to the rights of the plaintiff.

Twenty-fifth. That the Court erred in refusing the requests for findings of fact made by plaintiff and numbered 1 and numbered from 6 to [208] 12, both inclusive, and numbered 17 and numbered from 23 to 26, both inclusive, and numbered from 28 to 34, both inclusive, and 37 thereof, and in failing to make findings of fact upon said matters and in finding the facts contrary thereto.

Twenty-sixth. That the Court erred in refusing the conclusions of law requested by plaintiff numbered 1 to 3, both inclusive, and those numbered 4 to 9, both inclusive, and that one numbered 12, and in failing and refusing to conclude upon the law as therein requested.

Twenty-seventh. That the Court erred in holding and deciding as it did in its opinion and decision July 31, 1915: "Under these circumstances it is clear that the mere fact that the defendant Peter Sandberg had at the time of signing the application other contractual relations with the Wells Construction Company, would not make him other than an accommodation indemnitor and of itself would not make a debt growing out of the indemnity agreement the debt of his wife or the community."

Twenty-eighth. That the Court likewise erred in its opinion July 31, 1915, in holding and deciding: "The fact that Peter Sandberg paid direct certain material men furnishing supplies for the construction of the Kentucky Liquor Company Building under a contract with the Wells Construction Company is not unusual conduct under such circumstances. His becoming an indemnitor for the Wells

Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that thereby he would protect any community interest in the completion of the [209] Kentucky Liquor Company Building.

Twenty-ninth. That the Court's rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to wit: The said rulings for identification on this assignment being referred to as A, B and C:

A. "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time."

B. "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

C. "Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you

show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.”

Thirtieth: That the Court erred in deciding that Peter Sandberg alone was liable and that there was no liability of the community estate upon the evidence and law of this case.

Thirty-first. That the Court erred in making its finding and in finding and declaring that defendant Mathilda Sandberg had no knowledge or notice of the matters and things set forth in finding of fact IX made by said Court or of the pendency of said action referred to therein [210] and that said finding was against the evidence and against the law.

Thirty-second. That the Court erred in making its finding of fact numbered XII in so far as it therein found that neither of the defendants had any financial interest in the Wells Construction Company and that Plaintiff's Exhibit 2 was signed by Peter Sandberg for accommodation only and that there was no agreement or understanding that the defendant should receive anything and that Wells Construction Company in June, 1910, was in good and substantial condition, for that the same is against the law and against the evidence.

Thirty-third. That the Court erred in its finding of fact numbered XXII in finding that the agreements therein referred to were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife, Mathilda Sandberg, and in concluding therein “That said agreements or either of them were not for the benefit or gain or in the in-

terest of the community consisting of the defendants or for the use, benefit or interest of the defendant Mathilda Sandberg," for it is against the law and against the evidence.

Thirty-fourth. That finding of fact XXIII made by the Court is against the evidence, inconsistent with the other findings of fact and against the law and disregards and ignores the rule of law that the husband is the manager of the community estate and the agent of the wife. [211]

Thirty-fifth. That the finding of fact XXV made by the Court is against the evidence of R. H. Lund and in disregard of said evidence and based upon the ruling of the Court excluding the evidence of said Lund and in disregard of the same, for that said stock referred to in said corporation was placed in the hands of Newton H. Peer and Charles T. Peterson as trustees for the use and benefit of Peter Sandberg.

Thirty-sixth. That the third conclusion of law made by the Court is erroneous and contrary to the law and inconsistent with the findings of fact which the Court did make and against the findings of fact requested by the plaintiff which the Court refused to make and against the evidence.

Thirty-seventh. That conclusion of law IV made by the Court is erroneous and contrary to the law and inconsistent with the findings of fact which the Court did make and against the findings of fact requested by the plaintiff which the Court refused to make and against the evidence.

Thirty-eighth. That the Court erred in entering

the judgment and order of the 13th of June, 1916, for that it is against the law, against the evidence, and contrary to the evidence; that in entering the judgment of the 13th of June, 1916, the Court erred in limiting the right of recovery to plaintiff to Peter Sandberg alone and denying any right of recovery against the community property.

WHEREFORE, the above-named plaintiff in error prays that the aforesaid judgment of the above-entitled Court in this cause entered [212] June 13, 1916, be reversed so far as it limits recovery of plaintiff to Peter Sandberg alone and that it be adjudged and decided that plaintiff have the right to recover against the community estate.

WILLIAM C. BRISTOL,
Attorney for Plaintiff in Error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [213]

Order Allowing Writ of Error and Fixing Amount of Bond.

This cause being further heard on the petition of the plaintiff for allowance of a writ of error, and there being filed therewith an assignment of errors to be urged by plaintiff, praying also that a transcript of the record and proceedings and papers in this case and the original exhibits duly authenticated upon which the judgment and adjudication in this cause were rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and

that such other and further proceedings may be had therein as proper in the premises, it is by the Court here now

CONSIDERED, ORDERED AND ADJUDGED that a writ of error as prayed for by the plaintiff be and the same is hereby allowed, and the plaintiff being a surety company authorized to do business in Washington may file its bond herein in the full and just sum of five hundred dollars (\$500) as security for all damages and costs that the defendants above-named may sustain in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 11th day of Dec., 1916.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [214]

Bond on Writ of Error.

United States of America,
District and State of Washington,—ss.

KNOW ALL MEN BY THESE PRESENTS, that American Surety Company of New York, the plaintiff above named and authorized to do a surety business of and in this district and the State of Washington, does hereby bind and hold itself to pay unto the defendants Peter Sandberg and Mathilda Sandberg the full and just sum of five hundred dollars (\$500), to be paid to the said defendants, his

or their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, American Surety Company of New York binds itself, its successors and assigns jointly and severally by these presents.

Sealed and executed this 11th day of December, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, the above-entitled cause was lately heard and determined in the above-entitled court and a judgment was rendered against American Surety Company of New York and in favor of Mathilda Sandberg and the community estate of Peter Sandberg and Mathilda Sandberg, and the plaintiff having petitioned for and obtained the allowance of a writ of error and filed a copy thereof in the clerk's office to reserve said judgment in said cause and the citation having been issued and directed to the defendants admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city and county of San Francisco within thirty (30) days therefrom.

Now, the condition of the above obligation is such that if the said American Surety Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its said writ of error good, then the above obligation to be [215]

void, otherwise it is to remain in full force, virtue and effect.

AMERICAN SURETY COMPANY OF NEW
YORK.

By C. MILFORD COYE,
Resident Vice-president.

By C. E. DUNKLEBERGER,
Resident Asst. Secretary.

[Corporate Seal of American Surety Company of
New York.]

Sealed and delivered in the presence of:

F. E. GRIGSBY,
D. M. SAWTELLE,

Approved:

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of
Washington, Southern Division. Dec. 11, 1916.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [216]

**Stipulation to Transmit Original Exhibits to
Appellate Court.**

It is stipulated by and between counsel for the respective parties, in order to shorten the record herein and obviate cost of printing, that all of the original exhibits introduced by either party hereto as now in possession of the clerk of this court may and shall be, under the order of this Court, transmitted direct to the United States Circuit Court of Appeals for the Ninth Circuit with the transcript of record herein

for use by either party in the United States Circuit Court of Appeals upon the hearing of the writ of error in this cause, and that the Court here may make such order as is customary in such cases for the transmission of such original exhibits.

Dated at Tacoma, Washington, November 28, 1916.

BATES, PEER & PETERSON,
Attorneys for Defendants.
W. C. BRISTOL,
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 4, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.
[217]

Order Transmitting Original Exhibits as Part of the Record.

It having been stipulated by respective counsel, in order to shorten the record and obviate unnecessary printing, that the original exhibits herein may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record herein, it is by the Court here

CONSIDERED, ORDERED AND ADJUDGED that the clerk of this court in making up the proceedings may and shall transmit with the original record herein all of the original exhibits as introduced in evidence in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, at San Fran-

ciseo, as part of the record herein for consideration of the Appellate Court.

Given and done in open court this 4th day of Dec., 1916.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 4, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.
[218]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of American Surety Company of New York, a Corporation, Plaintiff, versus Peter Sandberg and Mathilda Sandberg, his wife, Defendants, as required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office in said District at Tacoma; and that the same constitute my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error and original Citation, together with two original Orders Extending Time to File Return on Writ of

Error; and that, under separate cover, duly certified, I am transmitting herewith the original exhibits called for in Stipulation of Counsel and Order of Court for removal of same herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 589 folios at 15¢ each.....	\$88.35
Certificate of Clerk to Transcript, 3 folios at 15¢ each.....	.45
Seal to said Certificate.....	.20
Certificate and Seal to original exhibits, 3 folios65

[219]

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 10th day of March, A. D. 1917.

[Seal]

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger,
Deputy Clerk. [220]

Writ of Error.

The United States of America,—ss.

The President of the United States, WOODROW WILSON, to the Honorable Judge of the District Court of the United States of the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between American Surety Company, of New York, a corporation, plaintiff in error, and Peter Sandberg and Matilda Sandberg, his wife, defendants in error, a manifest error has happened to the damage of the plaintiff in error as by said complaint appears, and we being willing that error, if any hath been, should be corrected and a full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the United States Court of Appeals may cause further to be done therein to correct the error what of right, and according

to the laws and customs of the United States should be done.

Witness the Honorable EDGAR DOUGLASS WHITE, Chief Justice of the United States, this 11th day of December, A. D. 1916.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Stambak,

Deputy Clerk.

No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. American Surety Company of New York, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Citation on Writ of Error.

United States of America,
District of Washington,—ss.

To Peter Sandberg and Matilda Sandberg, His Wife,
and to Bates, Peer & Peterson, Their Attorneys
of Record, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Washington, wherein American Surety Com-

pany of New York, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and particularly justice should not be done to the parties in that behalf.

Given under my hand and seal at Seattle in said District, this 11th day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal]

EDWARD E. CUSHMAN,

Judge.

District of Washington,
County of Pierce,—ss.

Due service of the within citation on writ of error is hereby accepted in Tacoma, Pierce County, Washington, this 11th day of December, 1916, by receiving a copy thereof duly certified to as such by W. C. Bristol, attorney for plaintiff in error.

BATES, PEER & PETERSON,

Attorneys for Defendants in Error.

No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. American Surety Company of New York, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Order Extending Time to File Transcript on Writ of Error.

This cause being further heard on the application of the plaintiff in error for an extension of time to file transcript on writ of error,

IT IS, by the Court, here now CONSIDERED, ORDERED AND ADJUDGED that the time in which to file transcript on writ of error is hereby extended sixty (60) days from and after the 29th day of the time allowed by law for lodging said transcript in the Circuit Court of Appeals.

ORDERED, this 11th day of December, 1916.

EDWARD E. CUSHMAN,
District Judge.

In the United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Mathilda Sandberg, His Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Order Extending Time to and Including April 5, 1917, to File Record.

For good cause shown, it is by the Court here now CONSIDERED, ORDERED AND ADJUDGED that the time within which to file in the United States Circuit Court of Appeals for the Ninth Circuit, the

transcript or record on Writ of Error herein is hereby extended to and including the 5th day of April, A. D. 1917.

Dated this 2d day of March, A. D. 1917.

EDWARD E. CUSHMAN,
District Judge.

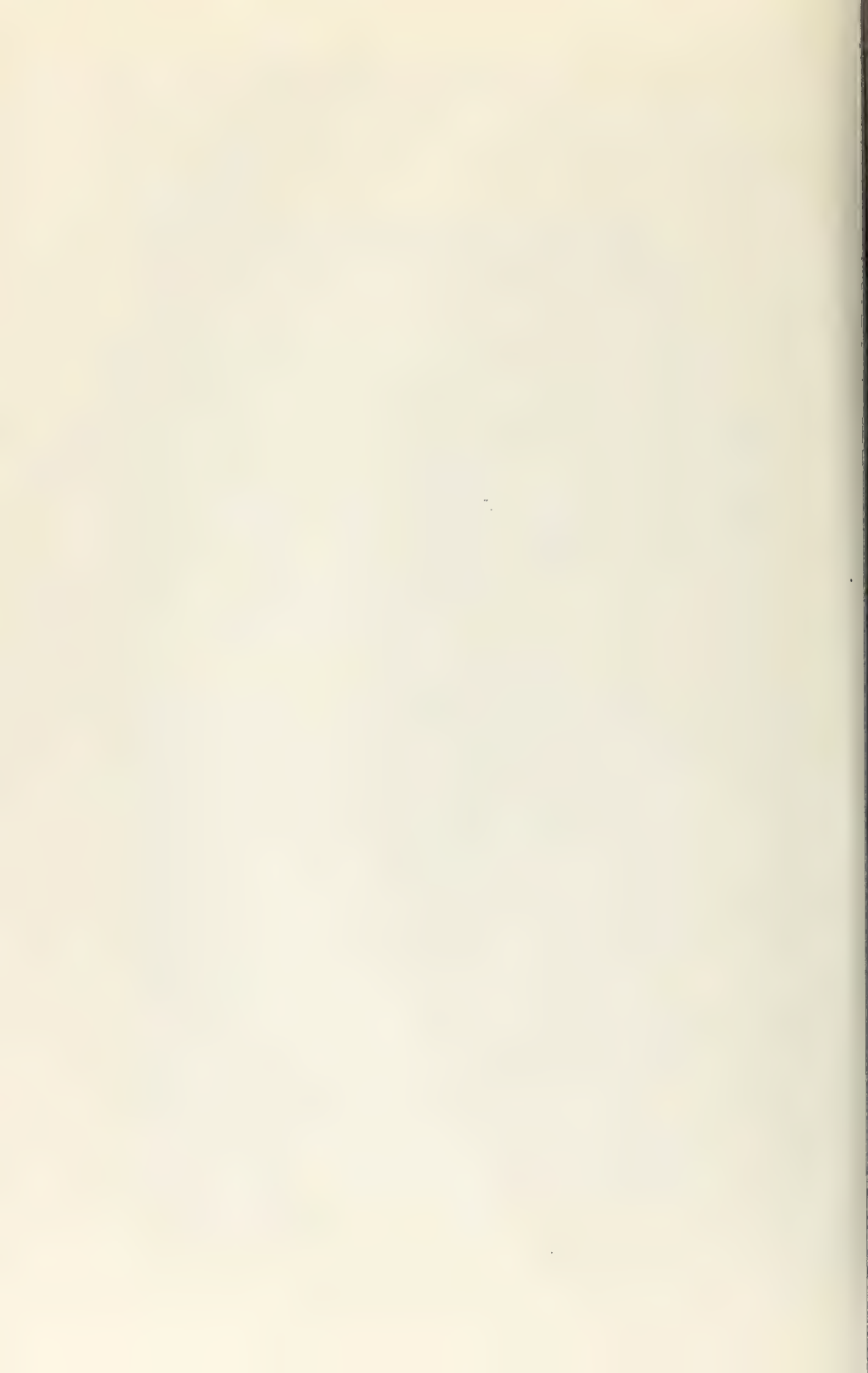
In the United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Mathilda Sandberg, His Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 2, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2951. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed March 14, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



IN THE
**United States Circuit Court
of Appeals for the
Ninth Circuit**

AMERICAN SURETY COMPANY
OF NEW YORK, a Corporation,
Plaintiff in Error,

VS.

PETER SANDBERG and
MATHILDA SANDBERG,
his wife,

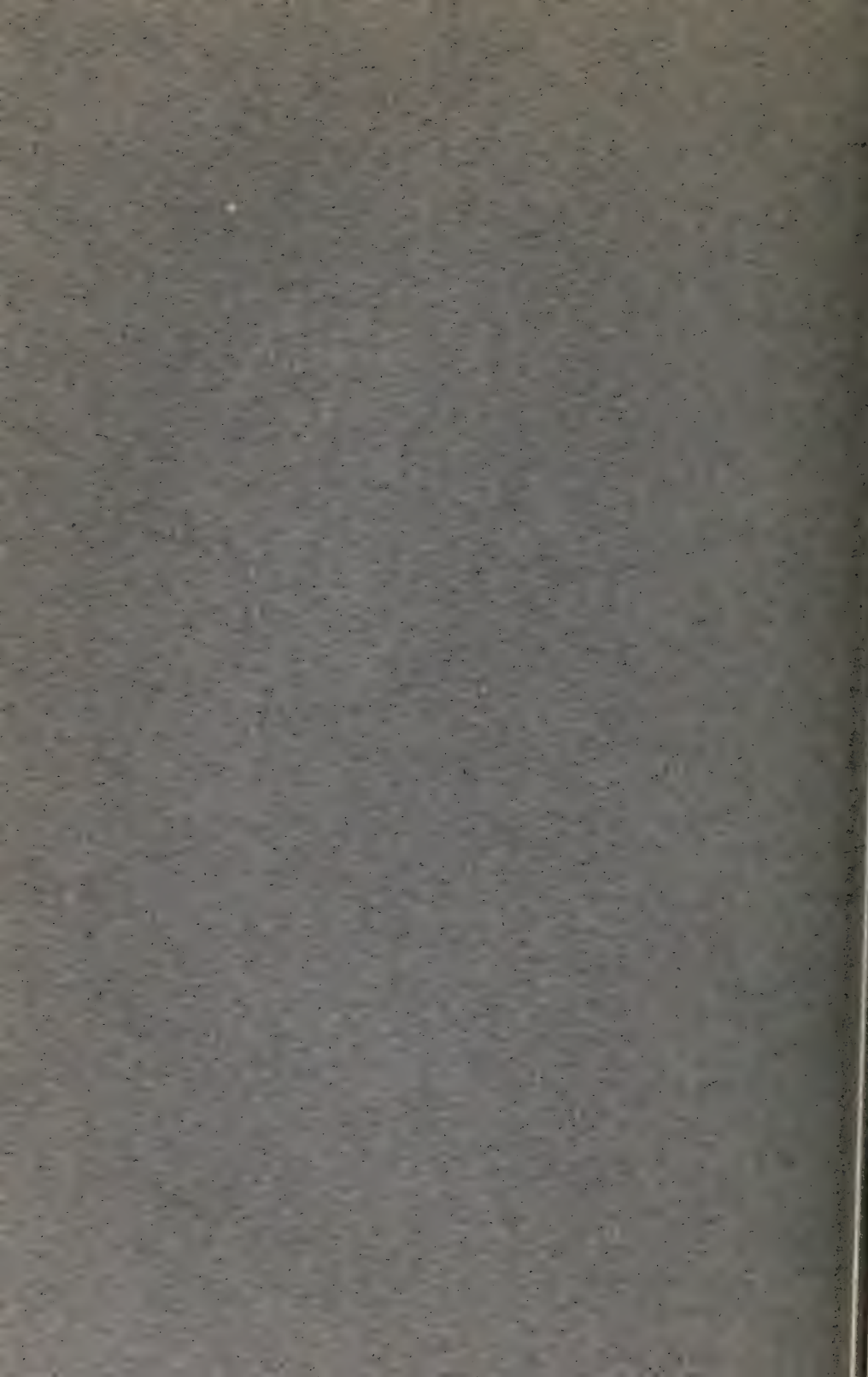
Defendants in Error.

No. 2951

Brief of Plaintiff in Error

MESSRS. BATES, PEER & PETERSON and
MR. CHARLES F. PETERSON,
Tacoma, Washington,
Attorneys for Defendants in Error.

WILLIAM C. BRISTOL,
Portland, Oregon,
Attorney for Plaintiff in Error.



IN THE
United States Circuit Court
of Appeals for the
Ninth Circuit

AMERICAN SURETY COMPANY
OF NEW YORK, a Corporation,
Plaintiff in Error,

vs.

PETER SANDBERG and
MATHILDA SANDBERG,
his wife,

Defendants in Error.

No. 2951

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

American Surety Company of New York, upon receiving the application introduced in evidence as Plaintiff's Exhibit No. 2 and as set forth in the complaint (record p. 28), made and entered into a bond, Plaintiff's Exhibit No. 3, in the sum of

twenty-five thousand dollars (\$25,000) to Powell River Paper Company, Ltd.

Thereafter Wells Construction Company made default in its contract and Powell River Paper Company, Ltd., enforced the bond with the result that a judgment was taken against the American Surety Company of New York for the sum of thirty-one thousand six hundred thirty-two and 94-100 dollars (\$31,632.94) to the extent of the amount of its bond in the sum of said twenty-five thousand dollars (\$25,000).

In and about these proceedings there were stipulated items of costs and expenditures amounting to fifteen hundred fifty-six and 20-100 dollars (\$1556.20) in defense of liabilities adjudicated against the plaintiff in error, making in all a total of twenty-six thousand five hundred fifty-six and 20-100 dollars (\$26,556.20).

For the purpose of recovering these moneys from Peter Sandberg and Mathilda Sandberg, his wife, as the community, a complaint was filed in the United States District Court of the Western District of Washington, Southern Division. The particular features of the indemnity agreement or contract upon which the right of recovery was based consist of the following:—

“VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, **any right, or remedy, or demand which the indemnitor may have for**

the recovery of any sums paid by the **Surety** by virtue of its suretyship, and any and all extensions and renewals thereof, **together with** all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the **Surety**, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose."

* * * * *

"**X.** That the **Surety** also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the **Surety**, under this agreement, such suretyship having been by the **Surety** entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the

award and performance of such contract and obtaining such suretyship."

(See record pp. 24 to 26.)

The defendants made an answer and admitted that Peter Sandberg signed and subscribed the application for the contract bond as set forth in the complaint, but both defendants took the position that the application was signed for the sole benefit, use and accommodation of Wells Construction Company and not for the use, benefit or profit of Peter Sandberg or his co-defendant, Mathilda Sandberg, or the community consisting of the defendants nor for the aid, use or benefit of any purpose in which the defendants or either of them or the community consisting of them was interested. The scope of the answer of the defendants is practically within these limits and they set forth a detailed list of the community property and allege that it would be a cloud upon the title if a judgment was rendered against Peter Sandberg individually or against the defendants jointly.

(See record p. 42.)

The complaint in this case specifically presented the following certain and definite issue:—

"Par. XI.

That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and in-

demnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.

Par. XII.

That in and by paragraph IX in said application and indemnity agreement hereinbefore referred to and in paragraph VI hereof described, it is, among other and various things, provided that the order, judgment or adjudication by reason of such suretyship shall be prima facie evidence of the fact and of the extent of the indemnitor's liability thereof to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of the said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement and that the suretyship was entered into for the special benefit of the said Peter Sandberg and the special benefit and protection of Peter

Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship and to both said clauses IX and X said Peter Sandberg agreed in addition to the other clauses in said agreement.

Par. XIII.

That the defendant, Peter Sandberg, contracted with the plaintiff in the manner aforesaid in the prosecution of the community estate, business and enterprise in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company and of contracts entered into between it and Powell River Paper Company, Limited, on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia and participation in profits derived from its operations in the Province of British Columbia and would and did further obtain the postponement of payment and discharge of indebtedness of Peter Sandberg and said community, estate and business from liability thereon to said Wells Construction Company."

The plaintiff in error made its motion early in the case to strike out this answer for the causes and reasons set forth on pages 43 to 45 of the record, and the Court granted the paragraph of

the motion which was a denial as shown in paragraph IV of the answer (p. 38 of record) that in turn was directed to paragraph XI of the complaint.

Now paragraph XI of the complaint distinctly alleged:—

“That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and indemnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.”

(See record p. 34.)

The Court made its order that the answer as stricken might stand as the amended answer (record p. 46) and thereupon the plaintiff in error filed its reply which tendered issue upon denials as to affirmative matter and pleaded affirmatively and as new matter estoppel of the right to either or both of the defendants to deny the terms of the written agreement, Plaintiff's Exhibit No. 2.

(See record pp. 50 and 51.)

Moreover estoppel was also pleaded based upon the proposition that the contract, so far as the plaintiff in error was concerned, was executed and that the plaintiff as surety had relied upon the contract and representations of said Sandberg in his said contract when the plaintiff in error had given its bond to Wells Construction Company.

(See record p. 54.)

Furthermore estoppel was pleaded based upon specific notice upon Peter Sandberg at his family residence.

(See record pp. 57 to 63.)

(See, also, Assignments of Error, 2nd, 3rd, 9th and 10th.)

(Record pp. 258 to 260.)

At the time of trial the Court permitted Mathilda Sandberg to file a separate answer over the objection of the plaintiff in error.

(See record pp. 63 to 69.)

The case was stipulated to be tried before the Court without a jury and as the findings of fact and the opinion of the Court and its actions on the different features of the case will be discussed in the brief, it is not disposed here in the statement to make a long explanation of it. Suffice it to say that the Court granted a judgment against Peter Sandberg individually, but denied any relief against the

community and held to all purposes and effects that there was nothing in the estoppels pleaded; that because Peter Sandberg had made these agreements as the husband and agent of the community was no reason why the community should be bound and thereupon passed a judgment wherein, according to the fourth conclusion of law, it was provided:—

“That said judgment should provide that it is a separate debt of Defendant Peter Sandberg, and not a debt, liability or obligation of Defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real property of defendants hereinabove specifically set forth.”

Such a judgment was entered (record pp. 164-166.)

Within the time provided by law plaintiff sued out its writ of error and filed its assignments of errors and the cause comes to this Court to correct the judgment thus entered.

Big Facts in the Case and Court's Action Thereon

The trial court's refusal to sustain the motion of the plaintiff to strike out the answers of defendants in the particulars mentioned (record pp. 43-45) is assigned as error, record page 257.

But the trial court did strike out Par. IV of the **joint answer** of defendants, record page 38, and also Par. IV of the separate answer of Mathilda Sandberg, which the court allowed her to file on the day of the trial. (Record p. 65.)

Consequently Par. XI of the complaint of the plaintiff stood then and stands now as admitted. The full importance of this situation appears when the findings of the court in this relation are examined.

The court among other findings of fact made the following:—

“XIII.

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants from any liability under ‘Plaintiff's Exhibit 2,’ and said agreement

was introduced and received in evidence herein as 'Plaintiff's Exhibit 10.'

XIV.

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars (\$35,000) then due."

* * * * *

"XVI.

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

XVII.

That Peter Sandberg paid direct certain material-men furnishing supplies and laborers performing work, to-wit, Tacoma Mill Company, to-wit, one named Grosser, to-wit, one named Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit 'A' entered into with Wells Construction Company.

XVIII.

That Peter Sandberg took over the building known as the Kentucky Building under the contract Defendants' Exhibit 'A,' and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

XIX.

That the work which the Wells Construction Company was doing in June for Peter Sandberg was community work and the building described in Defendants' Exhibit 'A' was a community building and consisted of and became community property.

XX.

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler, were defendants and the same is in evidence in this cause as 'Plaintiff's Exhibit 7' and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:—

'III. That on or about said last date above referred to, to-wit, the — day of August,

A. D. 1910, the defendants, Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business. * * *

‘IV. That pursuant to said agreement so entered into, plaintiff on or about the — day of August, 1910, went with the defendant, Simon Mettler, to the City of Vancouver, in

the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant's request, and in accordance with said agreement hereinabove referred to, endorsed certain promissory notes and a guarantee in writing to The Bank of Vancouver, of Vancouver, B. C., to the amount of Twenty-five Thousand (\$25,000) Dollars, and plaintiff pursuant to said agreement so made with said defendants endorsed as a surety an indemnity bond to the American Surety Company in the sum of Ten Thousand (\$10,000) Dollars, to enable said defendants and said Wells Construction Company to enter into a contract with the said City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of Twenty-five Thousand (\$25,000) Dollars to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company, are yet uncompleted and plaintiff is as yet unrelieved from the liability on account of said notes, guarantee and indemnity bonds. * * *

'XII. That the liability of plaintiff on ac-

count of the bonds, notes and guarantees executed by him pursuant to said agreement with the defendants, Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the same will probably exceed Thirty Thousand (\$30,000) Dollars, over and above the securities and indemnity already held by plaintiff.'

XXI.

That on the 26th day of May, 1914, in cause No. 35986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants, Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court, in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this

cause as 'Plaintiff's Exhibit No. 8' as follows, to-wit:—

‘INTERROGATORY No. I.

‘Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case?

‘ANSWER TO INTERROGATORY No. I.

‘Yes.

‘INTERROGATORY No. II.

‘If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

‘ANSWER TO INTERROGATORY No. II.

‘The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thousand (\$33,000) Dollars. That during the construction of said building an additional story was added thereto as an extra.

at the agreed price of Thirty-five Hundred (\$3500) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1379, making the total contract price for said building, including extras \$37,879.00.

‘INTERROGATORY No. III.

‘What did you every pay the Wells Construction Company for the work done by them for you?

‘ANSWER TO INTERROGATORY No. III.

‘I paid the Wells Construction Company \$35,794.40 in cash, and paid material-men for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

‘That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around

building, at \$2.50 per day.....	\$100.00
Cleaning of floors in third story of the old and new building.....	300.00
2 Doors taken out in the old Kentucky Building	100.00
Breaking of Skylight in Langlow Building adjoining	17.90
Cost of installing switches for lights in Kentucky Building	700.00
Wiring floors for bell push-buttons..	200.00
10 fire doors short.....	200.00

Total, \$1,617.90

‘That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. * * *

‘INTERROGATORY No. VI.

‘State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and the date of the completion of same.

‘ANSWER TO INTERROGATORY No. VI.

‘The Wells construction Company began the construction of a building for defendants in

February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. * * * ”

“XXIV.

That during all the times herein mentioned Messrs. Bates, Peer & Peterson were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Kentucky Liquor Company, and Messrs. Peterson and Peer were on November 26, 1910, president and secretary, respectively, of Wells Construction Company.”

Plaintiff filed its exceptions to the findings of fact, etc., made by the court (record pp. 158-163) and among others presented the following exception:—

“ELEVENTH EXCEPTION:

Plaintiff excepts to the finding of fact numbered IX wherein it is found that the notice of the 17th of May, 1911, was served upon Peter Sandberg ‘at his place of business,’ whereas the evidence shows and the notice itself in evidence with proof of service attached thereto exhibits, that upon that date there was served upon Peter Sandberg as his residence and at the residence of Mathilda Sandberg in

Tacoma, a notice as specified in said finding, which is Plaintiff's Exhibit 4, and that said finding IX is against the evidence for that Mathilda Sandberg had means of knowledge and her attorneys, Messrs. Bates, Peer & Peterson, knew of all the matters and things contained in said notice."

(See Assignment of Error, Thirty-first, Record p. 269.)

In this connection the testimony of Mrs. Sandberg (record p. 183 is very important.)

"On cross-examination this witness testified that she was sure that none of the property which had been described in her answer was ever the property of Peter Sandberg before they were married and that she was sure he did not have any other property, and during all of the time that they had lived together Mr. Sandberg was looking after all of the property interests and was looking after all of the business and that she always trusted her husband and did not take any part in that and that whatever had been made and whatever had been done had been done by Mr. Sandberg and she went along with him as his dutiful wife."

(See Assignment of Error, thirty-third, Record, p. 269.)

(See, also, Assignment of Error, Thirty-fourth, Record, p. 270.)

The contracts of indemnity that Peter Sandberg

admittedly entered into for the desired benefit of the community were as follows:—

“Plaintiff’s Exhibit 9—Agreement, November 26, 1910, Between Kentucky Liquor Co. et al. and Simon Mettler.

“THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, A Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife, parties of the first, and SIMON METTLER, party of the second part.

WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia Corporation, and the Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., a certain real property in Pierce County, Washington, described as follows, to-wit:

Dia. Twelve (12), Lot Fifteen (15) Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six

(26), Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to-wit:

The north thirty (30) acres of the Northwest quarter ($\frac{1}{4}$) of the Northwest ($\frac{1}{4}$) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest quarter ($\frac{1}{4}$) of the Southwest quarter ($\frac{1}{4}$) of the Northwest quarter ($\frac{1}{4}$) of the same Section, Township and Range, which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to-wit:

A note for the sum of Twenty-five Thousand (\$25,000) Dollars, made by the Wells Construc-

tion Company to said Bank of Vancouver, dated at Vancouver, B. C., ——— 1910, due ninety days after date.

A note for Fifty-five Thousand (\$55,000) Dollars, made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C., ——— 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand (\$10,000) Dollars; One to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand (\$3000) Dollars;

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand Five Hundred Dollars (\$79,500), besides interest;

And whereas said Mettler is the holder of

one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent.

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same

for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, a trustee, shall apply by conversion or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, The Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their president and secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively hereto.

IN WITNESS WHEREOF, said parties

have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

Signed, Kentucky Liquor Company, a corporation, by Peter Sandberg, its President, Attest, P. H. Lack, Secretary. Wells Construction Company, a corporation, by Charles T. Peterson, its President, Attest, Newton H. Peer, Secretary. Geo. E. Vergowe. Simon Mettler."

It is perfectly apparent that the foregoing agreement is directly within the terms of Article VIII of the indemnity agreement sued upon.

(Plaintiff's Exhibit 2.)

"Plaintiff's Exhibit No. 10—Agreement, June 20, 1910, Between Wells Construction Co. and Peter Sandberg.

"AGREEMENT.

THIS AGREEMENT made and entered into this 20th day of June, 1910, between the Wells Construction Company, a corporation, of Tacoma, Washington, and Peter Sandberg of the same place,

WITNESSETH: That whereas the Wells Construction Company has heretofore on the — day of —, 1910, entered into a contract with the Powell River Company of Vancouver, B. C., for the construction of a dam

and canal on the Powell River, B. C., for a price approximating \$175,000 and

Whereas the said Wells Construction Company has made application to the American Surety Company of New York to become surety on the bond of the said Wells Construction Company in the sum of \$25,000 for the faithful performance by the said Wells Construction Company of the conditions of the said contract, and

Whereas the said American Surety Company of New York refuses to become surety upon the said bond of the said Wells Construction Company without some other person signing the application with the said Wells Construction Company for the said surety company to become surety upon the said bond, and

Whereas the said Peter Sandberg of Tacoma, Washington, has agreed to sign his name with the said Wells Construction Company on the application for the said bond agreeing to indemnify the said surety company in case it should be held liable on the said bond,

Now, Therefore, in consideration of the said Peter Sandberg signing the said application with the said Wells Construction Company for the said surety company to become surety upon the said bond, the said Wells Construction Company agrees to re-pay to the said Peter Sandberg any money or moneys which he may

be required to pay to the said American Surety Company of New York by reason of his signing the said application with the said Wells Construction Company for the said surety Company to become surety upon the said bond and to hold the said Peter Sandberg harmless by reason of his assigning the aforesaid application.

WELLS CONSTRUCTION COMPANY,

By SIMON METTLER,
President.

By JOE WELLS,
Secretary.

We individually agree to hold said Peter Sandberg harmless by reason of signing said application for a bond above mentioned.

SIMON METTLER,
JOE WELLS."

The Court refused to consider these Exhibits as matter of law in anywise relative to the case so far as community was concerned; and this action is assigned as error,—13th Assignment, record, p. 261.

The trial court in its opinion had this to say of these transactions:—(Record p. 86.)

"Later, after that company got into financial difficulties, its stock was delivered to the attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save him-

self. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

But both these Exhibits 9 and 10 are actually and specifically covered by the VIIIth article of the indemnity agreement. (Plaintiff's Exhibit 2.)

The Law of the Case

The statutes of Washington relative to the property rights of husband and wife, among other things, provide:—

“The husband shall have the management and control of community personal property with the like power of disposition as he has of his separate personal property,” and “that the husband has the management and control of the community real property.”

And the Supreme Court of Washington, in interpreting these statutory provisions, in *McDonough v. Craig*, a decision by Justice Hoyt, 10 Wash. 241, upon the question “whether or not the community property is liable for the debt incurred by the husband alone,” said:—

“In our opinion the first question above stated has been settled by the decisions of this court. In the case of *Oregon Improvement Company v. Sagmeister*, 4 Wash. 710 (30 Pac. 1058), we held that community property could be sold upon a judgment against the husband, rendered for an indebtedness incurred by the husband by reason of losses in business in which he was engaged, with which the wife had no connection further than that cast upon her, by the law, as a member of the community. In that case it was held that since under our stat-

utes the community was *prima facie* entitled to the profits of any business carried on by the husband, good conscience and fair dealing, as well as logic, required that it should abide the result of such business.

We are satisfied with the rule laid down in that case. A further consideration of the question has confirmed our convictions that everything rightfully done by the husband will be presumed to have been done in the interest of the community, and that such presumption will obtain unless it is made affirmatively to appear that the transaction in question related to his separate property. The legislature never could have intended that everything acquired by the husband as the result of any and every transaction in which he might be engaged should be presumed to be the property of the community, and at the same time not have intended that a like presumption should obtain as to any indebtedness or liability incurred on account thereof. Under the law as established by that case, it must be held that any liability incurred by the husband in the prosecution of any business is *prima facie* a charge against the community; and that the presumption to that effect will continue in force until it is overthrown by proof that such liability was not incurred in any business of which the community would have had the benefit, if profit had been realized therefrom."

In the late case of *McElroy v. Hooper*, the Supreme Court of Washington said, 70 Wash. 350:—

“The husband has the management of the community property. As the community profits by his good judgment, so it must bear the losses of his mistakes. It cannot accept the one and repudiate the other.”

In *Miller v. Geary*, 81 Wash. 217, at page 221, the Supreme Court, speaking through Judge Mount, confirms the repeated holding that the husband is the agent of the community and the community therefore liable for the acts and things thus done by him for it.

Woste v. Rugge, 68 Wash. 90, where the community is held liable for a tort on the theory of the husband's agency for the community business.

THE COURT REMEMBERS IN THIS CASE THE POSITIVE TESTIMONY OF BOTH SANDBERG AND WIFE THAT THERE IS NO OTHER PROPERTY OWNED BY ANY OR EITHER OF THEM THAN PROPERTY, REAL AND PERSONAL, ACQUIRED SINCE THEIR MARRIAGE AND THEREFORE THERE IS NO SEPARATE ESTATE OF EITHER OF THEM.

In a still later case, the Supreme Court of Washington, in *Stuart v. Bank of Endicott*, 82 Wash. 106, holds unqualifiedly that the community personal property, by reason of the above quoted statute, becomes impressed with all liabilities, either communal or personal.

Judge Hanford while on the Bench in this District decided the case of *Levy v. Brown*, 53 Fed. 568, and therein held that the community personal property was liable even for a debt of the husband alone.

The statutes of Washington further provide (Rem. & Bal. Sec. 5917), "Property, etc., acquired after marriage by either husband or wife or both is community property."

The Supreme Court of Washington, referring to the case of *McDonough v. Craig*, above quoted, and to later cases, fixed the character of a contract which the husband signed alone, and in the course of its opinion said:—

"Under the statute, he has the management and control of the personal property. He had in his possession \$1,074 of community funds which he desired to invest in this real estate. His wife objected. But he persisted in his desire and purchased the property. He had a right to do so, under the statute which gives him the management and control of the personal property. It will not do to say that, where one member of the community uses community funds against the wishes of the other member of the community and makes an investment, a mere objection of the other makes the property acquired the separate property of the one making the investment. And yet, if the contention of the appellants is sustained in this

case, that would be the result; for it is argued that, because Mrs. Murrey objected to the contract, it became the separate contract and liability of her husband."

Baker v. Murrey, 78 Wash. 241.

To the same effect is *Johns v. Clothier*, 78 Wash. 615.

It is quite immaterial under the interpretation of the law made by the Supreme Court of Washington above shown and in the still later case of *Way v. Lyric Theater*, 79 Wash. 275, at page 278, whether any profit or benefit resulted from the transactions had and all evidence therefore as to whether or not Sandberg or Mrs. Sandberg received any money or benefit does not present any issue whatever; the test is, was the transaction under all the facts carried on for the benefit of the community. The evidence showing that there was nothing else than the community, neither Sandberg nor his wife having any other property to be benefited, the incontrovertible conclusion is that the transactions were for the community.

In the recent case of *Bird v. Steele*, 74 Wash. 70, the Supreme Court, speaking through Justice Chadwick, announces this doctrine:—

"Roberge and Steele were subcontractors, and engaged to do certain work for a stipulated price. They failed to meet the terms of their contract, and the firm is chargeable with the amount that Raftery paid for them. The

primary test in this, as it has been in all of the later decisions of this court, is to ascertain the character of the debt. If the debt is a separate debt of the husband, the community would not be bound. **If it is a debt incurred in the prosecution of a business or an enterprise out of which the community would have reaped a benefit, it is a community debt, and the husband and wife are principals in so far as their community property is concerned.** Measured by this standard, we have no doubt that the obligation assumed by Mrs. Steele was direct and not collateral; that she executed the contract as a principal and not as a surety. This court has held in a long line of cases, indeed, as it said in *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738, that a debt contracted by the husband in the prosecution of the community business renders the community property liable for the debt, is no longer an open question in this state. This principle has been applied to simple contract debts. *Oregon Imp. Co. v. Sagneister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Horton v. Donohoe-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045; *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610. To an accommodation Indorser: *Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402. To one liable for a superadded liability as a subscriber

to the stock of a corporation: *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536. To obligations incurred as a surety for a corporation in which the husband is a stockholder and the stock belonged to the community: *Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478; *Allen v. Chambers*, 22 Wash. 304, 60 Pac. 1128. In an action for fraud and deceit: *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. And finally it was held that the community is liable for a tort committed by the husband when engaged in a business conducted for the benefit of the community. *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913 A. 318, 36 L. R. A. (N. S.) 88; *Woste v. Rugge*, 68 Wash. 90, 122 Pac. 988."

This being the law of the State of Washington upon this subject, the Federal Courts follow the decisions of the highest Court of the State interpreting the law of the State with respect to property rights.

Buchser v. Morse, 196 Fed. 577 at middle of p. 579;

Affirmed by Circuit Court of Appeals, Ninth Circuit, 202 Fed. 854, at p. 856;

Note: (The foregoing decision was originally made by District Judge Rudkin);

In re Farrell, 211 Fed. 212, at p. 214;

Note: (A decision by District Judge Neterer);

Old Colony Trust Company v. City of Tacoma, 219 Fed. 780;

Note: (A decision by District Judge Cushman);

Seattle R. & S. Railway v. State of Washington, 231 U. S. 568, 58 L. Ed. 372.

Sandberg deliberately contracted in writing with the plaintiff that he was beneficially interested in the performance of the contracts of the Wells Construction Company and the law will not now permit him to deny that fact.

The plaintiff pleaded this contractual stipulation in its complaint and has again pleaded its contractual stipulation in its reply.

The decisions of the Supreme Court of the United States establish the worth of this plea and that Sandberg is estopped.

Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167;

United States v. Lamont, 155 U. S. 303, 39 L. Ed. 160;

Consumers Cotton Co. v. Ashburn (C. C. A. 5th Ct.), 81 Fed. 335;

George v. Tate, 102 U. S. 564, 26 L. Ed. 232.

In the case of Samuel Sprigg v. Bank of Mt. Pleasant, 10 Peters 257, 9 L. Ed. 416, the Supreme

Court of the United States at this early date announced the rule as follows:—

“In this case the fact of the defendant’s being surety is not only not admitted, but it is alleged that he is estopped from setting it up by his own admission in his obligation that he is principal. And we are not aware of any place giving countenance to such a defense at law, under such circumstances.”

Merchants National Bank v. Murphy, 125
Iowa 609, 101 N. W. 442.

Argument

THE FIFTH, SEVENTH, TWELFTH AND TWENTY-NINTH ASSIGNMENTS OF ERROR CONSIDERED TOGETHER.

These assignments present what are believed to be the crucial questions of the case upon the record. They will be found coupled together at page 268 of the record, and separately stated at pages 258 and 259, and at 260 and 261. They present the following matters:—

“Twenty-ninth. That the Court’s rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to-wit: The said rulings for identification on this

assignment being referred to as A, B and C:

A. 'It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time.' (Record p. 258.)

B. 'It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company.' (Record p. 259.)

C. 'Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.''' (Record p. 261.)

If Sandberg's testimony be accepted as true, then Wells Construction Company was largely indebted

to Sandberg in June, 1910, upon contract, "defendants' exhibit A."

If Wells' testimony be also accepted as true, then Sandberg was owing the Company, and the Company was owing Sandberg, about June and October, 1910.

If Mettler's testimony likewise be accepted as true, then Sandberg was owing Wells Construction Company some considerable sum in June and August, 1910.

In any of these three specified conditions of evidence the conclusion is irresistible that the Sandberg community was materially concerned in the affairs and acts of Wells Construction Company.

All of the undisputed and uncontradicted circumstances show that Sandberg's intention and purpose was to take and obtain full indemnity for all liabilities the community assumed through him.

Particularly the payments for labor and for material that went into the building erected under "defendants' exhibit A."

(See checks to Tacoma Mill Company.)

(See checks to Grosser.)

(See checks to Olaf Halstead and others.)

Sandberg also testified he had to take the building over and finish it himself.

This undoubtedly was community business; and Sandberg took and obtained the agreements of June 20, 1910, and November 26, 1910, from Wells

Construction Company as indemnity against community liability therefor.

The joint answer of both defendants settled before trial upon the issues of fact and law admits all of the facts in this case entitling plaintiff to recover. Subsequently and at the time of trial the Court allowed the filing, over objection, of a separate answer for Mathilda Sandberg, wherein she eliminates the entire paragraph III of the joint answer heretofore filed and changes her plea of direct admission that a judgment against Peter Sandberg would be a cloud upon the title to the community real property. The defense of confession and avoidance as accommodation maker and surety is preserved in the old answer, against which plaintiff pleads estoppel.

June 20, 1910, Sandberg executed and acknowledged before notary public, plaintiff's exhibit No. 2, which is the indemnity agreement sued upon that among other things specified the construction then in progress of the building described in "Defendants' Exhibit A."

June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe, individually executed to Peter Sandberg an indemnity agreement specially to save the community estate of Sandberg and wife harmless from any liability under plaintiff's exhibit 2, then executed by Sandberg to enable Wells Construction Company to get its expected contract.

November 26, 1910, Peter Sandberg, Chas. T. Peterson, his attorney, and Rydstrom with Wells went to Vancouver about the business. On or prior to this date Mettler, Vergowe, Wells and Lund had turned over their stock to Peter Sandberg at a meeting at which Sandberg personally was present and where Chas. T. Peterson took manual delivery of the certificates of stock, and became president of the Wells Construction Company with Newton H. Peer secretary in the place and stead of Lund.

On the 3rd of October, 1910, Wells Construction Company rendered a statement to Sandberg claiming a balance of over thirty-five thousand dollars then due.

On November 29, 1910, three days after the arrangements had been completed with the Vancouver Banks about the trusteeship through Kentucky Liquor Company, Sandberg renders statement to Wells Construction Company claiming some three thousand dollars due the community personalty. These transactions alone demonstrate community interest.

But on November 26, 1910, by agreement of Kentucky Liquor Company (Sandberg's business, and way of doing business) with Wells Construction Company, and Simon Mettler and George Vergowe individually, this Company of Sandberg's became **trustee** for Peter Sandberg and others, but

for Peter Sandberg specifically to indemnify and save him harmless from

(a) bond for and to Powell River Paper Company

(b) "claims and accounts."

Chas. T. Peterson, the attorney for Sandberg, swore on the stand, as a witness for his client Sandberg, that Elmer M. Hayden became successor trustee to Kentucky Liquor Company and the property described in the instrument of November 26, 1910, was foreclosed and sold in pursuance of its terms.

It is exceedingly important, if taken as true, that one of the banks absorbed all the proceeds, because thereby community liabilities were so much reduced, Sandberg relieved, and so much of the debt paid to and received by the bank then holding Sandberg's personal endorsement on the renewed note.

Between June 20, 1910, and November 26, 1910, Sandberg personally had made two or three trips to Vancouver, B. C., while Wells Construction Company was working on Powell River contract affecting the liabilities involved in the case at Bar.

Notably the visit of July, 1910, and of October 19, 1910, when guaranty agreements in writing providing for joint and several liability upon the part of Sandberg, Mettler, Vergowe and Wells were entered into with Molsons Bank touching financial operations of Wells Construction Company.

Moreover, the visit of Peter Sandberg to and with the Bank of Vancouver produced transactions intimately associated with that bank's participation in the trust agreement of November 26, 1910, under which Sandberg's company (Kentucky Liquor Company) was trustee.

It is the conceded fact as well as the sworn evidence that from and after marriage November 30, 1894, Peter Sandberg never owned, managed or held property separate and apart from the community.

Likewise Mathilda Sandberg had not then and has not other property than the community. The management and care of all of which by statutory law of the State and her expressed confidence and trust in her husband she left to him, and his and her attorneys, Bates, Peer and Peterson.

It is therefore indisputable that all acts and things done by these people were community acts and things, whether successful or not, and community transactions for which the community took its chance of liability.

Any liability, however, resulting could only be satisfied out of the community, and any indemnity given or benefit accruing could only be for that community.

When Sandberg originally signed the indemnity agreement, "plaintiff's exhibit 2," he and his wife both knew there was no other property existing than community property. When the agreement

was taken from Wells Construction Company to save harmless Sandberg from any liability, that liability so saved was community liability and hence intended community benefit.

When the trust agreement of November 26, 1910, was taken, the plain and evident and therein expressed purpose and intention was to protect the community through its agent, Sandberg.

It is the law and the fact, and Sandberg knew, that the community **personalty** was all under his care, control and management as the husband and therefore the rents, issues, incomes and revenue from the community **realty** were answerable to the created liability if it became necessary to enforce the plaintiff's exhibit 2; and in fact by unmistakable language, without any suggestion of excuse, Sandberg expressly stipulated and said in paragraph X of that exhibit that he and his then property (but he and his wife swear that then and now they had no other than community) was beneficially interested in the doings of Wells Construction Company and the issuance of the bond by the American Surety Company to Powell River Paper Company, Ltd., so that the contract might be obtained and the dam built out of which expected profit was to be derived.

The American Surety Company in good faith executed and performed its part, and has sustained and paid liability; although Sandberg was called on to defend, and did not; although Sandberg com-

munity was called on to pay and did not and yet has not.

Nevertheless the **only** property of either or all the defendants is confessedly community estate, both real and personal.

Material information was before the defendants and each of them through their attorneys.

Bates, Peer and Peterson were and are attorneys, in all the matters and during all the times mentioned in the scope of this case for the following named

- (1) Peter Sandberg
- (2) Mathilda Sandberg
- (3) Wells Construction Company and respectively president and secretary thereof on November 26, 1910
- (4) Receiver of Wells Construction Company
- (5) Bank of Vancouver in Mettler bankruptcy proceedings
- (6) Molsons Bank in Mettler bankruptcy proceedings
- (7) Kentucky Liquor Company

each and all of whom featured themselves in this case with participating interests in the community management of community property by the community agent, Peter Sandberg.

The benefit accruing to the community from Sandberg's acts was allowing Wells Construction Company to get the bond so that it might proceed with its contracts and repay to Sandberg and his

wife the moneys moving between Wells Construction Company and Sandberg and his wife for the construction of the building described in “defendant’s Exhibit A.”

Two things were evident at the time Sandberg entered into the indemnity agreement with the plaintiff: **First**, that getting the contract from Powell River Paper Company would enable Wells Construction Company to get money to pay Sandberg back for the money he had advanced on his building, or enable the Wells Construction Company to complete the contract with Sandberg as to that building, or, **second**, Sandberg, by reason of the instruments executed to him, would be enabled to recoup for the benefit of the community the advances that he claims he already made, and these transactions all grew out of one and the same subject matter, to-wit, the relations of Sandberg with the Wells Construction Company, through his attorneys, through himself and through the witnesses who testified for him.

The Supreme Court of Washington, says in the McGregor case (58 Wash. top of page 80):—“The community having received the benefit should now be estopped from denying its liability.”

Moreover, the judgment rendered in British Columbia in behalf of Powell River Paper Company is conclusive upon Sandberg and wife; they were notified and had an opportunity to defend; they could have defended and they did not do so,

and they are under the law laid down by Judge Donworth when a Judge of this Court and afterward affirmed by the Circuit Court of Appeals for this Circuit, concluded in all respects by that judgment.

Robbins v. Chicago, 4 Wall 657, 18 L. Ed. 430;

Washington Gas Light Company v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712, at p. 719;

Compagnie v. Burley, 183 Fed. 168 near foot of page.

Note: (A decision by District Judge Donworth in this same Court.)

Affirmed by Circuit Court of Appeals, Ninth Circuit, 194 Fed. 335.

The evidence is uncontradicted and unexplained that Peter Sandberg upon his oath, February 20, 1911, in a cause in the Superior Court, as per the complaint offered and received in evidence, wherein Peter Sandberg was plaintiff and Simon Mettler and others defendants,—that he, Peter Sandberg, then stated and swore:—

“That on or about August, 1910, Wells Construction Company, Simon Mettler and his wife, George Vergowe and his wife and Joe Wells and his wife entered into an oral agreement with plaintiff wherein and whereby, in consideration of plaintiff’s endorsing certain

notes, bonds and guarantees hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements for which said Wells Construction Company then held contracts, it was agreed that they * * * would convey by deed real property in Pierce County * * * to fully secure and indemnify plaintiff on account of his endorsement to said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business.”

Therein also Peter Sandberg swore on his oath:—

“That Simon Mettler gave a list of all his property which he and his wife were to convey to Peter Sandberg pursuant to said agreement ‘or as much thereof as plaintiff may deem necessary to protect, secure and indemnify him against liability in endorsing the notice and papers and in signing the guarantees and bonds * * * to enable them to obtain credit and money to carry on said contracting business.’”

And further Peter Sandberg swore in said complaint:—

“That pursuant to said agreement so entered into plaintiff on or about the —— day of Aug-

ust, 1910, went to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at its request and in accordance with said agreement * * * and signed an indemnity bond to said American Surety Company in the sum of \$25,000.00 to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation.”

And said Peter Sandberg in said complaint further swore:—

“That the liability of plaintiff on account of the bond * * * executed by him pursuant to said agreement * * * has not as yet and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be the sum will probably exceed \$30,000.00 over and above the securities and indemnity already held by plaintiff.”

The Supreme Court of the United States in *Pope v. Allis*, 115 U. S. 363, at p. 372, 29 L. R. A. 393, at page 397, holds that a pleading in an action at law sworn to by the party is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated.

Citing *Elliott v. Hayden*, 104 Mass. 180 and other cases.

The Supreme Court of the United States adhered to this rule with reference to affidavits or depositions wherein in the case of *Chicago & Northwestern Railway Company v. Ohle*, 117 U. S. 123, at p. 129, the Supreme Court says, speaking through Mr. Chief Justice Waite:—

“We see no error of the admission of the affidavit in evidence. The affidavit having been filed in the cause by the company as a ground for obtaining an order of the court in its favor was competent evidence against it on the trial of another issue.”

Citing *Pope v. Allis*, 115 U. S. 363.

It is also the rule in the Federal Courts,

General Electric Co. v. Jonathan Clarke, 108 Fed. 170.

One of the later State cases states the rule as follows:—

“Any pleading or other paper filed by a party in a cause which states facts relevant to the issues in another cause in which the party filing said pleading or paper is also there a party, may be read as evidence in such cause then on trial against the party who made it as an admission in evidence of the facts stated.

Snyder v. Chicago Railway Co., 112 Mo. 527, 20 S. W. 885;

St. Paul Fire Marine Insurance Co. v. Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483;

Elliott v. Hayden, 104 Mass. 180.

In the case of Molsons Bank v. Peter Sandberg and wife in the Superior Court of the State of Washington for this County, Mathilda Sandberg stated in conjunction with her husband, her co-defendant, in that cause, that she knew that the Wells Construction Company was building a building, the amount of its contract price, the amount of payments thereon and how the work was progressing for the community estate composed of herself and her husband.

There can be no question that the work that Wells Construction Company was doing for the community was community work for the answer shows that the building was being erected upon what is described and pleaded as community property. As already shown the knowledge of the attorney is the knowledge of the client, notice to the attorney is notice to the client. Parties and their privies will not be permitted in a court of law to change their position to the injury and detriment of one who has acted on the faith thereof. The American Surety Company executed its bond and incurred liability thereon on the faith of the Sandberg community, and it is likewise unquestionable that the Sandberg community was upholding in all of the transactions Wells Construction Company

in the doing and carrying on of its business in order that the Sandberg community might be protected to the extent of its interest under its contract, "defendants' exhibit A," for the erection of the building and against any liability that might be incurred or come about through the endorsements and accommodations of Sandberg upon the other notes, claims and agreements which the agreement of November 26, 1910, positively states that he had assumed.

Hence it is that the community interest and no other interest than that of Peter Sandberg and his wife was or possibly could have been intended in the solemn stipulation that Peter Sandberg entered into as paragraph X of plaintiff's exhibit 2 on June 20, 1910, with American Surety Company, this plaintiff herein, and both of the defendants under the law are bound thereby.

It is quite immaterial to the case at bar what Sandberg's attorneys or himself were really doing or had theretofore done when on November 26, 1910, all of the stock of Wells Construction Company had actually come into their possession and control; and also quite immaterial what arrangements were made with the British banks; but it is enough to know and see from all of their acts and the documentary evidence in this case that all of the relations which all of them acted upon were regarded so far as joint and combined in interest that in every particular thing done from and inclusive of June, 1910, down to the failure of the

Wells Construction Company, Sandberg and those acting for him were taking every precaution to indemnify the community business managed by him and advised and directed by his attorneys, Messrs. Bates, Peer and Peterson, themselves officers of Wells Construction Company, in the interest of their community client.

It is a fundamental principle of law and an elementary rule of morals that innocent third persons without notice cannot without compensation be misled to their prejudice by the acts or omissions of any one. When Sandberg, therefore, who had no other than community interest to serve, acted in furtherance of his own supposed business interests and interlocked and combined his position as community manager with the Wells Construction Company affairs, he did so in carrying on community business. In fact, Judge Easterday in a recent case in the Superior Court of the State of Washington in Pierce County (Bankers Trust Company v. Peter Sandberg and wife, involving the business relations and operations of Sandberg with Lucas and Lucas Stronach Lumber Company) while commenting on similar dealings of Sandberg with others in that case, said:—

“The business relations and operations of Sandberg were so interdependent and so interlocked and so far in the possession and under the control of Sandberg that it cannot be said Sandberg was a mere accommodation maker of

these notes signed by him with them. In view of all the circumstances it appears to the court that Sandberg signed these notes in the furtherance of his own supposed business interest and that the liability thereon is that of the community."

EIGHTEENTH TO TWENTY-FOURTH ASSIGNMENTS OF ERROR (RECORD PAGES 262 TO 266, BOTH INCLUSIVE) CONSIDERED TOGETHER.

These assignments relate to the exclusion and rejection by the Court of the evidence of R. H. Lund concerning whether or not Joe Wells had ever stated to him or whether he knew or whether from the accounts and books kept of the contract between Sandberg and Wells Construction Company he had ascertained **what Peter Sandberg was owing the Wells Construction Company on and after June, 1910.**

The Court even refused to allow the witness, Lund, to state as to what his knowledge was as to the amount of that particular indebtedness.

And it is assigned that the Court erred and abused its judicial discretion in respect of the whole course of the proceedings with respect to this witness, Lund.

It does not seem necessary to repeat all of the matters that took place which are covered so par-

ticularly in the assignments of error on pages 263 to 264 of the record. The Court will find, however, the whole of these proceedings set forth at pages 245 to 254, both inclusive.

The record of these proceedings with reference to the witness, R. H. Lund, are not long and the rulings of the Court were so prejudicial in respect of this witness's testimony to the plaintiff in error that the refusal of the Court to consider the same or allow him to testify or to consider the evidence in any way was necessarily an abuse of discretion, because such action is legally beyond reason.

Dyer v. National Steam Nav. Co., 118 U. S. 520;

Trustees v. Greenough, 105 U. S. 527.

That the Court committed a grave error is plainly observable from the Record, top of page 254, where he, as shown by the record, said with respect to this witness, Lund:—

“If he says that he did not say that I will have to disregard it.”

That the Court very unjustly treated this witness and the plaintiff in error appears quite clear from the statement and question in the middle of page 252 on cross-examination:—

“Q. You did not state in that connection up there, did you, that the stock was transferred to Peer & Peterson in trust for Mr. Sandberg?”

to which the witness answered “No, sir.”

Moreover, when this witness was asked what took place at the meeting of the stockholders during the latter part of October or early in November, 1910, in the Kentucky Building on Pacific Avenue, the witness answered, as shown on page 245 of the record, and specifically stated **that the certificates of stock were at that time turned over to Mr. Sandberg, or rather to Mr. Peterson being there as attorney for Mr. Sandberg.**

There was plain refusal by the Court to consider this evidence and to interpret it in accordance with the record; and this was prejudicial to the plaintiff in error because the Court should have found in accordance with the evidence but that it declined to do.

The assignments of error from Twenty-seventh to Thirty-eighth, inclusive, deal more or less with the matters already discussed.

But the Thirty-fifth assignment of error deals directly with the finding of fact XXV made by the Court against the evidence of R. H. Lund and based upon the ruling of the Court excluding the evidence of Lund.

The Court's finding XXV is upon pages 154 to 156 of the record and it will be observed that there is no reference whatever to the testimony of the witness, Lund, and that the finding is directly against the evidence.

Upon the whole case therefore as submitted by this record the plaintiff in error is surely entitled to a different judgment than was rendered by the Court below if the evidence offered is considered; and indeed the facts found by the Court when applied to the law require a judgment different than the Court reached in the case made.

Upon the defendants' own theory that the Wells Construction Company was solvent and able to pay all of its debts there was plainly no necessity for Sandberg to be taking indemnity from those who composed the Wells Construction Company upon account of any transactions he had with it. So it is perfectly plain, indeed conclusive, that what Sandberg was doing was for the benefit of protecting the community for which he was acting as the agent and in respect of which his wife was perfectly willing he should act, as the evidence nowhere discloses any objection; and of course neither of them can dispute what was done on the faith of what they promised to do as a community. The American Surety Company of New York did execute its bond, did sustain liability, and it gave its bond and incurred liability upon the faith of Peter Sandberg's contract, of which he had timely notice to defend in the Powel River suit served upon him "**at his residence**" and not at his place of business as the Court found apparently for the purpose, as

suggested by the defendant in error, of finding some excuse for the alleged want of the wife's knowledge.

Respectfully submitted,

WILLIAM C. BRISTOL,
Attorney for American Surety
Company of New York,
Plaintiff in Error.

Portland, Oregon,
May 2, 1917.

3

In the United States Circuit Court of Appeals for the Ninth District

AMERICAN SURETY COMPANY,
a corporation of New York,

Plaintiff in Error,

vs.

PETER SANDBERG and MATHIL-
DA SANDBERG, his wife,

Defendants in Error.

No. 2951.

UPON WRIT OF ERROR TO THE UNITED STATES DIS-
TRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

Brief of Defendants in Error

CHARLES O. BATES,

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Filed
MAY 17 1911
F. D. Monck

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STATEMENT OF THE CASE.

The statement made by plaintiff in error does not extend beyond a partial statement of the issues involved as made by the pleadings. We will therefore take it upon ourselves to make a full statement of the facts of the case.

This action was commenced by plaintiff in error against defendants in error to recover judgment

against defendants in error on an agreement of indemnity executed by defendant Peter Sandberg to plaintiff, under date June 2nd, 1910, to indemnify it against liability or loss by reason of its executing a certain bond in the sum of twenty-five thousand dollars, in behalf of Wells Construction Company, a corporation, obligor, to Powell River Paper Company, of Vancouver, British Columbia, obligee, to secure the performance of a contract theretofore entered into between the Wells Construction Company and the Powell River Paper Company.

See Plaintiff's Exhibit No. 2, Trans., p. 171.

The Wells Construction Company defaulted in the performance of its contract with the Powell River Paper Company and the Powell River Paper Company commenced an action in the Supreme Court of British Columbia, recovering a judgment therein against the Wells Construction Company and its surety, American Surety Company of New York, plaintiff in error here, in the sum of twenty-five thousand dollars.

See Plaintiff's Exhibit No. 5, Trans., p. 172.

Defendant Mathilda Sandberg appearing separately answered plaintiff's complaint admitting that her co-defendant, Peter Sandberg, signed and subscribed the indemnity agreement, Exhibit 2, and alleged that said Peter Sandberg executed the same for the sole use, benefit and accommodation of the

Wells Construction Company, a corporation, and that he did not sign or execute the same for the use, benefit or profit of himself, or of her, or either of them, nor for the use, benefit or profit of the community consisting of defendants, or for any purpose in which defendants, or either of them, or the community consisting of defendants, was interested in any manner whatsoever, and that so far as she and the community were concerned the same was without consideration.

See Separate Answer of Mathilda Sandberg.
Trans., pp. 63-66.

She further pleaded affirmatively that she and her co-defendant, Peter Sandberg, married on November 30th, 1894, and ever since said time were husband and wife, and then set forth, describing in detail, certain real property, all of which she alleged was acquired after their marriage by their joint efforts, and not by gift, bequest or inheritance, and that the same was community property, and prayed that whatever judgment, if any, should be recovered against her co-defendant, Peter Sandberg, should be adjudged and decreed to be his separate debt, and not her debt or obligation, nor a debt or obligation of the community consisting of herself and husband, Peter Sandberg, and further prayed that said judgment be adjudged not to be a lien on the community real property of defendants.

Trans., pp. 66-69.

The answer of defendant Mathilda Sandberg being in effect that the indemnity agreement sued upon in this action was executed by her co-defendant, Peter Sandberg, simply as an accommodation maker, and that therefore under the laws of the State of Washington there was no liability thereon against the Sandberg community.

A jury trial was waived by stipulation, and the cause was tried to the Court, resulting in a judgment against defendant Peter Sandberg in the full amount sued for, the Court holding, however, that it was his separate debt, and that the defendant Mathilda Sandberg and the community real property of defendants in error was not affected by the lien of said judgment, and dismissing the action as to Mathilda Sandberg.

See Judgment, Trans., p. 163.

From that portion of the judgment relieving defendant Mathilda Sandberg, and the community of Sandberg and wife from liability, plaintiff in error prosecutes this appeal.

The Court made elaborate Findings of Fact covering specifically and in detail the controlling features of the case, which will be hereinafter referred to.

We take it that the following facts are conceded:

That defendants Peter Sandberg and Mathilda

Sandberg married on November 30th, 1894, and are husband and wife.

That at the time of their marriage defendant Peter Sandberg had no property, except an equity in a small house worth about six hundred dollars. That thereafter he sold the house, and the money was expended by him without his keeping any separate account of the same.

That all of the real property described in the separate answer of defendant Mathilda Sandberg was acquired by purchase during the existence of the marriage relation between defendants in error by their joint efforts, and not by gift, bequest, or inheritance.

The following additional facts are established beyond controversy, viz:

That neither the defendant Peter Sandberg nor Mathilda Sandberg, his wife, were ever at any time stockholders in the Wells Construction Company.

Simon Mettler, Trans., p. 212.

Mathilda Sandberg, Trans., p. 183.

Peter Sandberg, Trans., p. 233.

Joseph Wells, Trans., p. 197.

Neither did either of said defendants have any interest, directly or indirectly, in the business of the Wells Construction Company.

Mathilda Sandberg, Trans., p. 183.

Peter Sandberg, Trans., p. 233.

Neither did said defendants, or either of them, participate in any way in the earnings or profits of the Wells Construction Company, or in any of its undertakings.

Peter Sandberg, Trans., p. 233.

In this connection the Court made the following Finding:

“That neither of the defendants, Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company.”

Finding No. XII, Trans., p. 137.

That neither of said defendants ever received anything, any property, advantage or consideration from the Wells Construction Company, or from the business in which it was engaged.

Simon Mettler, Trans., p. 211.

Peter Sandberg, Trans., pp. 234-238.

That defendant Peter Sandberg executed the indemnity agreement (Plaintiff's Exhibit 2) at the request of Simon Mettler and Joseph Wells, stockholders of the Wells Construction Company, without ever having received, and without the expectation, promise, understanding or opportunity of receiving any advantage, thing of value, opportunity to profit out of the transaction, either directly or indirectly.

Simon Mettler, Trans., pp. 210-211-214.

Joseph Wells, Trans., p. 199.

That Sandberg's act in signing the indemnity agreement was purely and solely an act of accommodation and friendship, for the sole use, profit and benefit of his friend Simon Mettler and the Wells Construction Company, and not for the use, profit or advantage, or in the prosecution of the community business of defendants Sandberg and wife, and not for the use, benefit or profit of either of them.

Simon Mettler, Trans., pp. 211-13-14-15.

In this connection the Court found:

"That defendant Peter Sandberg signed the application or indemnity agreement (Plaintiff's Exhibit 2) at the request of, and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application."

Finding No. XII, Trans., p. 137.

The only dealings which the defendants in error had with the Wells Construction Company were a contract entered into by them with the Wells Construction Company for the building of a wing to the Kentucky Building, at the agreed price of thirty-three thousand dollars, which was in writing, and an oral agreement thereafter for the construc-

tion of an additional story for thirty-five hundred dollars.

Joseph Wells, Trans., p. 200.

Defendant's Exhibit "A," Trans., pp. 200-201.

Simon Mettler, Trans., p. 214.

The building was practically completed and paid for prior to June 20th, 1910, thirty-five thousand five hundred and fifty and 80/100 dollars in cash payments having been made between January 22nd, 1910, and June 18th, 1910, in addition to certain labor claims amounting to about fourteen hundred dollars.

Joseph Wells, Trans., p. 201.

Defendants' Exhibit "B," being eleven checks as follows:

Date.	By Whom Drawn.	Payee.	Amount.
Jan. 22, 1910.	Peter Sandberg.	Wells Construction Co.	\$5,000.00
Feb. 12, 1910.	Peter Sandberg.	Joseph Wells -----	1,550.00
Feb. 12, 1910.	Peter Sandberg.	Joseph Wells -----	5,000.00
Marked, To apply on construction 1128 Pac. Ave. Bldg.,			
Mar. 3, 1910.	Peter Sandberg.	Wells Construction Co.	4,000.00
Mar. 17, 1910.	Peter Sandberg.	Wells Construction Co.	4,000.00
Apr. 9, 1910.	Peter Sandberg.	Wells Construction Co.	5,000.00
Apr. 23, 1910.	Peter Sandberg.	Joseph Wells -----	2,000.00
Apr. 25, 1910.	Peter Sandberg.	Wells Construction Co.	1,000.00
May 19, 1910.	Peter Sandberg.	Wells Construction Co.	5,000.00
June 4, 1910.	Peter Sandberg.	Wells Construction Co.	1,500.00
June 18, 1910.	Peter Sandberg.	Wells Construction Co.	1,500.00

Besides seven checks amounting to fourteen hundred thirty-two and 25/100 dollars, paid on the order of Wells Construction Company.

Joseph Wells, Trans., p. 201.

At that time the building was estimated to be ninety-five per cent. completed.

Joseph Wells., Trans., p. 206.

In this connection the Court made the following Finding:

“That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the building mentioned in the preceding finding for defendants, the contract price for which building, together with extras, was thirty-six thousand, five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand, three hundred eighty-three and 05/100 dollars (\$36,383.05). That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatever in the relationship of defendants and Wells Construction Company, in the matter of the construction of said building and the signing of said indemnity agreement (Plaintiff's Exhibit No. 2).”

Finding No. XII, Trans., pp. 137-138.

That at said time, which was the time that Sandberg executed the indemnity agreement (Plaintiff's Exhibit No. 2), the Wells Construction Company was in good financial standing, and was amply able financially to carry out all of its contracts, and was paying its debts in the usual course of its business, and was able to complete its contract with Sandberg for the construction of the

wing to the Kentucky Building on its own account, without any aid or assistance from Sandberg, or anybody else.

Joseph Wells, Trans., p. 206.

Simon Mettler, Trans., p. 211.

In this connection the Court found:

“That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.”

Finding No. XII, Trans., p. 138.

That subsequent to June 20th, 1910, the Wells Construction Company entered into other large contracts, and secured large loans of money from the Molsons Bank of Vancouver, B. C., of more than fifty-five thousand dollars, and the Bank of Vancouver, where it borrowed more than thirty-five thousand dollars. That nothing was ever said about the relations or business of the Wells Construction Company in connection with its contract with Peter Sandberg for the construction of the wing to the Kentucky Building in connection with Sandberg's signing of the indemnity agreement (Exhibit No. 2), and that the transaction with relation to the construction of the wing to the Kentucky Building had no relation or connection with Sandberg's act in signing the indemnity agreement (Plaintiff's Exhibit No. 2).

Joseph Wells, Trans., p. 200.

Simon Mettler, Trans., pp. 209-210.

That the only promise or agreement that Simon Mettler or Joseph Wells, or the Wells Construction Company, or any, or either of them, or anybody else made with Peter Sandberg in connection with his signing of the indemnity agreement (Plaintiff's Exhibit No. 2), was that he would in turn be indemnified against loss in accordance with the terms of the written agreement.

Plaintiff's Exhibit No. 10, Trans., pp. 226-231.

Simon Mettler, Trans., pp. 219-220-231.

That defendant Peter Sandberg endorsed the notes of the Wells Construction Company at the Bank of Vancouver and the Molsons Bank, and to indemnify him because of his endorsement certain real property was conveyed to the Kentucky Liquor Company as a trustee, for the sole use, benefit and protection of the Bank of Vancouver.

Simon Mettler, Trans., pp. 214-215.

Peter Sandberg, Trans., pp. 235-236.

C. T. Peterson, Trans., p. 244.

Defendants' Exhibit "E", Trans., p. 245.

That Simon Mettler agreed to convey to Sandberg, to indemnify him against loss for endorsing the note of the Wells Construction Company at the Molsons Bank, certain real property.

Peter Sandberg, Trans., pp. 240-241.

That the loan made by the Molsons Bank was

made on the 19th of October, 1910. Thereafter Sandberg, at the instance and request of the Molsons Bank, brought suit against Simon Mettler to require him to convey said property as indemnity for the use, benefit and protection of the Molsons Bank.

Peterson, Trans., p. 241.

Peter Sandberg, Trans., p. 240.

That Mathilda Sandberg never at any time acquiesced in, approved or ratified the acts of her husband Peter Sandberg in executing the indemnity agreement (Exhibit No. 2), and that she did not know that he had signed said indemnity agreement until after the commencement of this action.

Mathilda Sandberg, Trans., pp. 182-187-194.

We have grouped all of these facts, because the Court made one Finding referring to all of them, to-wit:

“That defendant Peter Sandberg, without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guarantees to banks in British Columbia, referred to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guarantees so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guarantees and in signing and entering into the several agreements referred to in the tes-

timony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guarantees and other agreements, excepting said contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as trustee, the Kentucky Liquor Co., the Molsons Bank and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction

Company was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the indemnity agreement sued on herein (Plaintiff's Exhibit No. 2), and that said building contract, and the relationship of the parties thereto, was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was entirely independent thereof, and was not spoken of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building contract was not a consideration, and was not regarded as a consideration of any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to."

Finding No. XXIII, Trans., pp. 152-153-154.

In the latter part of November, 1910, it became apparent that the Wells Construction Company was about to fail, and because of being an endorser on a large amount of its notes, defendant Peter Sandberg was requested to meet with the officers of the company regarding its financial affairs. After a full discussion of the matter it was agreed that the capital stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of the stockholders of the Wells Construction Company, and not otherwise, and held by them until such time as defendant Peter Sandberg could make an

investigation into the affairs of the Wells Construction Company, and decide whether or not he would undertake to finance the company to enable it to carry out its contracts, so as to save himself, as far as possible, from loss. This was done, and an investigation had. Mr. Sandberg declined to finance the company, and so notified the stockholders, whereupon the stockholders directed Peer and Peterson, as trustees, to turn all of the stock of said corporation over to one Joseph Wells, which was done.

Peter Sandberg, Trans., p. 104.

The Court referred to this matter in its Finding No. XXV, as follows:

“That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if the defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation and carry out

the contracts for the purpose of protecting, as far as possible, his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders, and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified the stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson, as said trustees, carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

Finding No. XXV, Trans., pp. 154-155-156.

And referring to this transaction in its opinion stated:

"Later, after that company got into financial difficulties, its stock was delivered to the

attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save himself. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

"A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

Trans., p. 86.

ARGUMENT.

The community property laws of the State of Washington place upon the wife a status with relation to the property rights of husband and wife so different from the other States having the communal system, that we deem it necessary to set forth the property statutes in full.

The Code, Remington's 1915 Codes and Statutes, provides:

"HUSBAND AND WIFE.

"Section 5915. SEPARATE PROPERTY OF HUSBAND.—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried."

"Section 5916. SEPARATE PROPERTY OF WIFE.—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

"Section 5917. COMMUNITY PROPERTY DEFINED—HUSBAND'S CONTROL OF PERSONALTY.—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

"Section 5918. COMMUNITY REALTY, CONVEYANCE OF, ETC.—The husband has the management and control of the community real

property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon."

"Section 5923. LIBERAL CONSTRUCTION.—The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. The chapter establishes the law of this State respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object."

It will be observed that the power of the husband cannot be extended so as to operate directly or indirectly to alienate or encumber the community real property, and inasmuch as the Supreme Court of the State of Washington has many times interpreted the sections of the statute set forth, and in view of the well established rule that the Federal Courts will follow the decisions of the highest court of the State interpreting the law of the State with respect to property rights, we will not extend our discussion of this question beyond a review of the decisions of our own State.

The case of *Brotten vs. Langert*, 1 Washington 73, seems to be the first well-considered case on the subject, decided by the Supreme Court of this State.

The Court, speaking through the late Justice Dunbar, well said:

“The community, composed of husband and wife, is purely a statutory creation; and to the statute alone must we look for its powers, its liabilities and its exemptions. * * * The statute alone determines who the members of the community shall be, the manner in which it shall acquire property, and defines and limits not only the powers of the members of the community over said property, but protects it from acquisition by others, excepting in the manner specified. It also lays down its own rule of construction in the language of the act itself: ‘The rule of common law that statutes in derogation thereof are to be strictly construed, has no application to this chapter. This chapter establishes the law of this territory respecting the subject to which it relates; and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.’ Then the pertinent and vital question becomes, What was the object sought to be effected? Section 2396 provides, ‘That every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property and to sue and be sued as if he or she were unmarried,’ and Section 2398 abolishes ‘all laws imposing civil disabilities upon a wife which are not imposed upon a husband,’ and succeeding sections define what separate property is, and provide how it may be acquired and in what manner disposed of. So far the evident object

of the law is to place husband and wife on an equal footing in relation to property matters. Section 2409 is as follows: 'Property not acquired or owned, as prescribed in Sections 2400 and 2408, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.' This section discriminates in favor of one spouse only so far as is actually necessary for the transaction of ordinary business. Section 2407 provides that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. Section 2410 reads as follows: 'The husband has the management and control of the community real property; but he shall not sell, convey or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; provided, however, that all such community real estate shall be subject to the liens of mechanics and others, for labor and material furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.' Construing all the provisions of the chapter together, we cannot escape the conclusion that the object of the law was to protect (so far as is consistent with the transaction of ordinary business,

as we before observed,) one spouse from the misdeeds, improvidence or mismanagement of the other concerning property which is the product of their joint labors. It is in the nature of an exemption, and, as has been well said, 'exemption laws are upheld upon principles of justice and humanity.' The statute provides the ways in which this property can be alienated: First, the voluntary alienation by the husband and wife joining in the deed; second, by making it responsive to certain demands, constituted liens by the statute; and there is no other way contemplated. In fact, the very object of the law is to prevent its alienation in any other way. It expressly provides that the husband shall not sell, convey or encumber it, and he will not be allowed to do, by indirection or fraud, that which he is directly prohibited from doing. The practical result to the non-contracting spouse would be the same whether the law allowed the other spouse to directly convey the property, or allowed the title to pass through the medium of a sale on an execution flowing from a judgment to which he, or she, was not a party. It is the results the law regards; the modes are not important."

These principles have been adhered to by the Supreme Court of the State in all of its decisions involving community property liability since that time.

In the case of *Spinning v. Allen*, reported in 10 Washington 570, which was overruled on another proposition, the Court said:

"The contract being one of suretyship, of course the judgment stands upon the same

footing, and the further question is presented as to whether community real estate can be held on a judgment obtained upon a contract of suretyship entered into by the husband. We have held that debts contracted by the husband in carrying on a business which is prosecuted in the interests of the community are community debts, on the ground that as the community receives the benefits of such a business it should be held liable for the losses. But we have never held the community real estate liable for a suretyship debt. The Code (Gen. Stat., Section 1413,) expressly provides that neither spouse shall be liable for the separate debts of the other. When the community is not liable for a debt contracted by the husband concerning his separate property, for which he received a consideration, how can it be said that the community should be held for a debt contracted where there was no consideration received or implied, moving to either the husband separately or to the community, as in the case of a suretyship, where the consideration moves, and is intended to move, entirely to a third party? Certainly there can be no presumption in any way that the community is or could be benefited by the husband's becoming a surety. There would be much more reason in holding the community where the husband contracts a separate debt for which he receives a consideration, for indirectly the wife or the community might receive some benefit therefrom, but the statute aforesaid shuts off any such liability. It would be going a step beyond this to hold the community responsible on a suretyship debt contracted by the husband."

This case was afterward reversed on a finding that the debt sued upon was one for the benefit of

the community, the husband having endorsed the note of a corporation in which he was a stockholder.

In *Gunde v. Parke*, 15 Washington 393, the Court held that a promissory note made to evidence a debt, which was not for the benefit of the community, should not be collected out of the community real estate, although it was made by the husband and had passed into the hands of a *bona fide* purchaser for value before maturity.

The same rule has been consistently enforced in the following cases:

Horton v. Donohoe Kelly Bank Co., 15 Wash. 399.

Shuey v. Holmes, 22 Wash. 194.

McDonough v. Craig, 10 Wash. 239.

Shuey v. Holmes, 20 Wash. 13.

Dane v. Daniel, 23 Wash. 379.

Olson v. Springer, 60 Wash. 77.

Bird v. Steel, 74 Wash. 68.

Way v. Lyric Theatre Co., 79 Wash. 275.

Case Threshing Machine Company v. Wiley, 89 Wash. 301.

Where a husband signed a note as surety only and received no consideration, it was held not a community debt, and judgment against the community was denied.

Wilson v. Stone, 90 Wash. 365.

To cite further cases would be a work of supererogation.

It must be perfectly manifest to this Court that defendant Peter Sandberg executed the indemnity agreement ("Plaintiff's Exhibit No. 2") purely as a matter of accommodation for his old, long-time friend, Simon Mettler, without any hope, promise or opportunity of reward or compensation for himself, or his co-defendant, Mathilda Sandberg, or their community, as the trial court found. In order that the community estate of these parties should be bound to respond for the payment of this obligation it was essential that the trial court find that the transaction was one for the benefit of the community; that is, one in the prosecution of the business of Peter Sandberg and his wife; one out of which the community of Sandberg and wife would get something in the way of profit or compensation should the venture prove a success.

We readily concede that in order that this obligation be one of the community of Sandberg and wife, that it was not essential that the community did actually receive a benefit out of the transaction, but it was essential that the transaction was one in the prosecution of community business, one out of which the community would have received a benefit or profit, should the venture prove a success.

Viewing this case entirely from plaintiff's own

standpoint, it must fail in its efforts to recover a judgment against the community.

DEFENDANTS' EXHIBITS 9 AND 10.

Counsel contends, brief, pp. 21 and 26, that on June 20th, 1910, and on November 26th, 1910, the latter date being long after the making of the indemnity bond sued on here, the Wells Construction Company and Mettler and Vergowe, as individuals, entered into a writing with defendant Peter Sandberg to indemnify and save him harmless from any liability because of his signing the indemnity agreement, Plaintiff's Exhibit No. 2, and that in November, 1910, the agreement, Exhibit No. 9, was entered into, whereby certain property was conveyed to the Kentucky Liquor Company (a Sandberg corporation), as trustee, to be held by it, for the purpose of indemnifying defendant Sandberg from liability or loss by reason of his signing certain notes as surety for the Wells Construction Company, and by reason also of his having signed Plaintiff's Exhibit No. 2. Is it possible by any stretch of the imagination to conceive how the defendants, or the community of Sandberg and wife, could possibly profit in the least out of such a transaction? If the undertaking by the Wells Construction Company had proven a success and the contracts had been carried to completion, and it had made a handsome profit out of the undertaking, the only result to defendant Sandberg would have been that he would have been released from

liability on the bond, or rather on the indemnity agreement, Plaintiff's Exhibit No. 2, given plaintiff, and the Wells Construction Company and Mettler and Vergowe would have been released on their indemnity agreements to Sandberg. The venture having proven a failure, the notes not being paid, the property and indemnity conveyed to the Kentucky Liquor Company went to the creditors, the Bank of Vancouver and the Molsons Bank. Sandberg could not take any of it, neither did he do so. He might have paid the debt and then held the property as security for the moneys so advanced by him, but whenever the Wells Construction Company and Vergowe and Mettler tendered or paid to him the amount he would have paid out in that connection it would have been his absolute, positive duty to have caused the property to be reconveyed to them. In either event he could not profit. He had no advantage; he had no opportunity of profit or benefit. The mere fact that he signed a note as a surety for the accommodation of another, and then took some indemnity to protect himself, did not change the legal effect of the transaction from a separate undertaking of his to one in behalf of the community of himself and wife.

Referring to these transactions, Judge Cushman in the course of his opinion said:

"A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself,

so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

See Trans., p. 86.

At page 28 of plaintiff's brief (referring to Exhibits 8 and 9) we find the following statement:

"The Court refused to consider these exhibits as matter of law in any wise relative to the case so far as community was concerned; and this action is assigned as error, 13th Assignment, record, p. 261."

As to Exhibit No. 9, the record shows Plaintiff's Exhibit No. 9 offered and received in evidence.

Trans., p. 220.

As to Plaintiff's Exhibit No. 10, the record shows (Exhibit No. 10), was over the objection of defendant Mathilda Sandberg, that it was irrelevant and immaterial, admitted in evidence.

Trans., p. 228.

Beginning on page 30, under the title, "The Law of the Case," plaintiff in error begins a discussion of the decisions of the State of Washington. It would serve no good purpose to follow his discussion in this particular. All of the cases to which he refers recognize in no unmistakable way the unvarying rule laid down in the early case of

Brotten v. Langert, 1 Wash. 73, to which we have called particular attention and quoted from at length.

On page 37 of its brief, plaintiff contends that Sandberg deliberately contracted in writing with the plaintiff that he was beneficially interested in the performance of the contracts of the Wells Construction Company, and is now estopped. This is undoubtedly true as to the defendant Peter Sandberg himself, but the estoppel would not operate as against Mrs. Sandberg, or as against the community.

On page 40 of its brief, plaintiff states that defendant Sandberg was largely indebted to the Wells Construction Company in June, 1910, upon the contract for the building of the Kentucky Building. The facts are, as the Court found,

“That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the building mentioned in the preceding finding, for defendants, the contract price for which building, together with extras, was thirty-six thousand five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand three hundred eighty-three and 05-100 dollars (\$36,383.05.) That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells

Construction Company in the matter of the construction of said building and the signing of said indemnity agreement, 'Plaintiff's Exhibit No. 2.' "

Trans., pp. 137-138.

On page 40 of plaintiff's brief we find the following unwarranted statement:

"All of the undisputed and uncontradicted circumstances show that Sandberg's intention and purpose was to take and obtain full indemnity for all liabilities the community assumed through him.

"Particularly the payments for labor and for material that went into the building erected under 'Defendant's Exhibit A.'

See checks to Tacoma Mill Company.

See checks to Grosser.

See checks to Olaf Halstead and others.

Sandberg also testified he had to take the building over and finish it himself."

The building was practically completed and practically paid for at the time plaintiff's bond was executed, and while Sandberg himself did put the minor finishing touches on the building the Wells Construction Company was amply able to do so. In this connection the Court found:

"That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course."

Trans., p. 138.

The agreements of June 20th, 1910, and November 26th, 1910, themselves show that they were taken by Peter Sandberg personally in his individual capacity, to protect himself against the accommodation endorsements made by him individually in behalf of the Wells Construction Company. Counsel for plaintiff makes the unwarranted statements all the way through his brief regarding these indemnity agreements, "Exhibits No. 9 and No. 10," that they were given to indemnify the community estate of Sandberg and wife, because of Sandberg executing the indemnity bond, "Exhibit No. 2." This is not the fact, as shown by the testimony and found by the Court.

In this connection see particularly the testimony of Simon Mettler, Trans., pp. 211-13-14-15, and the Court's Finding No. XII., Trans., p. 137.

Simon Mettler, Trans., pp. 210- 211-214.

Joseph Wells, Trans., p. 199.

which shows conclusively that Mathilda Sandberg never at any time knew of, acquiesced in, approved or ratified the acts of her husband in all of the matters and agreements referred to in this case, except the contract for the building of the Kentucky Building.

Mathilda Sandberg, Trans., pp. 182-187-194.

See particularly in this connection the Court's Finding No. XXIII.

Trans., pp. 152-153-154.

On page 43 of plaintiff's brief we find the following:

"It is exceedingly important, if taken as true, that one of the banks absorbed all the proceeds, because thereby community liabilities were so much reduced, Sandberg relieved, and so much of the debt paid to and received by the bank then holding Sandberg's personal endorsement on the renewed note."

It will be borne in mind in this connection that the obligations to the Bank of Vancouver and the Molsons Bank were on the same basis as the transaction involved in this case. Sandberg endorsed the notes of Mettler and the Wells Construction Company to these institutions, as shown by the testimony, purely as an accommodation, and his liability and obligations to those institutions were separate, and were not those of the community, so that the fact that the indebtedness owing these institutions by the Wells Construction Company was reduced by a conveyance or sale of the property held in trust does not change the situation.

The witness Mettler, it will be remembered, testified regarding the circumstances leading up to the borrowing of the money from the Bank of Vancouver, substantially as follows:

"We went to Vancouver and got Mr. Sandberg to go with us, and get some money from the Bank of Vancouver. Mr. Dewar was manager of the Bank of Vancouver, and he said to Mr. Sandberg, 'Why don't you get some security for putting your name on those notes?'" and Mr. Sandberg said, 'No, I would

rather for you to secure yourself,' and that was understood. On the strength of that conversation he let us have twenty-five thousand dollars, and it was understood we were to come back to Tacoma and execute the deeds to the bank, and then they found that an alien could not hold land in the State of Washington, and it was then proposed that the land be deeded to the Kentucky Liquor Company as security for the bank."

Simon Mettler, Trans., p. 231.

In this connection defendant Peter Sandberg testified that Mettler asked him to go up to Vancouver to assist him in getting some money, and thereupon detailed a conversation with Mr. Dewar, manager of the bank, regarding the deeding of the property as security, and that he signed the note as a surety.

Peter Sandberg, Trans., pp. 235-236.

Witness Vergowe stated that Sandberg endorsed this Bank of Vancouver note purely as a matter of accommodation, and that it was agreed then that the property would be turned over to the Kentucky Liquor Company as security for the Bank of Vancouver alone.

Trans., p. 241.

The proceedings in bankruptcy show that this property was in fact turned over as security for the Bank of Vancouver alone, and not for the indemnity or security of anybody else, and was finally foreclosed and sold and bid in by it in reduction

of the indebtedness of the Wells Construction Company.

Exhibit "E," Trans., p. 245.

It will be seen from the foregoing that the obligations of Sandberg to the Banks of Vancouver were purely an accommodation endorsement for the Wells Construction Company, and was, and is, a separate debt and obligation of defendant Peter Sandberg, for which the community is not now, and never was, liable, so that any reduction of the liability due the Banks of Vancouver could in no wise result in a benefit or advantage to the community of Sandberg and wife.

On page 45 of his brief, counsel for plaintiff refers to the community personalty. The question of community personalty is entirely outside of this case. It might be that plaintiff on its judgment could reach the community personalty. If there is sufficient to satisfy his judgment there is no occasion for this writ of error.

The defendant Mathilda Sandberg in her own behalf, and in behalf of the legal entity, the community of Sandberg and wife, defended this case for the purpose of preventing a judgment being entered against the community, which would be a lien on their real property, setting up specifically and in detail a description of their real property. The fact that the husband has control of the community personalty under our law can have no bearing whatever on the situation as far as this defense

is concerned. It is a fact that Mr. Peer and Mr. Peterson were on November 26th, 1910, elected temporary secretary and president of Wells Construction Company, simply for the purpose of receiving and holding its stock in trust for its stockholders, and holding in *statu quo* while Mr. Sandberg investigated whether or not he would undertake to finance it. He accomplished this within the course of two or three days, and decided that he did not want to undertake to finance it, and the stock was immediately turned over as directed by the stockholders, so that the connection of Peer and Peterson as officers of said corporation did not continue over a period of but a few days.

See Court's Finding No. XXV., Trans, p. 154.

Peter Sandberg, Trans., p. 104.

On pages 46 and 47 counsel contends that Sandberg's executing of the indemnity agreement, "Exhibit A," resulted in the American Surety Company executing the bond to the Powell River Paper Company, and that enabled the Wells Construction Company to enter into a contract with it, and that the Wells Construction Company would make some money to pay Sandberg back for money he had advanced it on the Kentucky Building.

His argument and reasoning in this connection are a good deal like the old nursery rhyme, "The House that Jack Built."

In its complaint in this action, plaintiff alleged

that at the time the indemnity agreement sued on herein was executed by defendant Sandberg, that he was indebted to the Wells Construction Company in a large amount, and that by reason of his executing the indemnity agreement in behalf of the Wells Construction Company the Wells Construction Company postponed the time of payment of his debt to it, thereby resulting in a benefit to the community, and in that manner the community received a benefit all growing out of Sandberg's execution of the indemnity agreement.

See Paragraph XIII., Plaintiff's Complaint, Trans., p. 38.

See Paragraph X., Plaintiff's Reply, Trans., p. 54.

It is impossible to reconcile the two positions.

It is next contended that the judgment rendered in British Columbia in behalf of the Powell River Paper Company against plaintiff in error was conclusive upon Sandberg and wife, because Sandberg had notice of it. Counsel did not undertake to explain how Mrs. Sandberg could have intervened in that case even if she had been notified of its pendency and had an adjudication by the Supreme Court of British Columbia regarding the community nature of her husband's undertaking and the legal status of their real property in this State. The contention is too ridiculous to merit consideration.

Pages 48 to 52 of plaintiff's brief are devoted to a discussion of the proposition that a certain complaint verified by Peter Sandberg in an action brought by him against Simon Mettler was evidence against him. We have no quarrel with this contention; the complaint was admitted in evidence and considered by the Court.

See Op. Trans., p. 85.

Counsel for plaintiff in error cites in support of his position a case against Sandberg in the Superior Court of Pierce County, Washington (*nisi prius*.) If that court is to be regarded as an authority in this jurisdiction it might not be out of the way to suggest the fact that actions in behalf of the British Columbia banks were instituted against Sandberg and wife in the same court on the obligations of the Wells Construction Company and Mettler executed to those banks, and endorsed by Sandberg, which actions were defended on the same grounds as the defense made here, resulting in the same judgment as made by Judge Cushman in this action, which was not appealed from, and that the Honorable R. A. Ballinger, the learned author of "Ballinger's Law of Community Property," was counsel for the banks.

In view of the clear and convincing nature of the proof in this case, and the findings as made by the trial Court, we are quite at a loss to understand why this Court should be burdened with its review, as it seems to us well nigh impossible for a litigant

to make a plainer, clearer case entitling him to the relief demanded than was made by Mrs. Sandberg.

We respectfully submit that the judgment of the lower court should be affirmed.

CHARLES O. BATES,

CHARLES T. PETERSON,

Attorneys for Defendants in Error.

IN THE

**United States Circuit Court
of Appeals for the
Ninth Circuit**

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation,

Plaintiff in Error,

vs.

PETER SANDBERG and MATHILDA SAND-
BERG, his Wife,

Defendants in Error.

No. 2951.

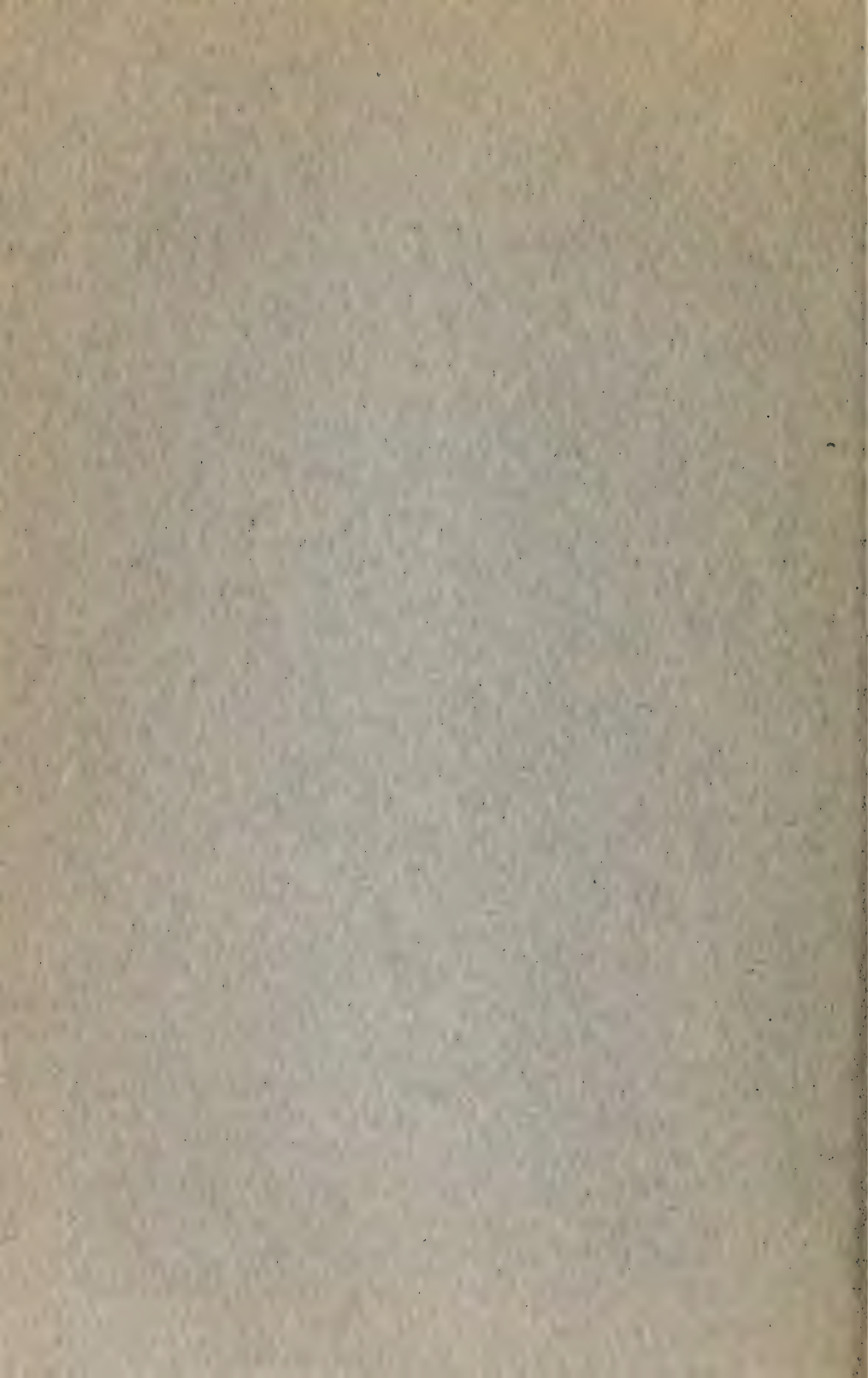
Petition for Rehearing

WILLIAM C. BRISTOL
For Appellant

Filed

SEP 4 - 1917

F. D. Monckton,
Clerk.



IN THE

**United States Circuit Court
of Appeals for the
Ninth Circuit**

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,	Plaintiff in Error,	} No. 2951.
vs.		
PETER SANDBERG and MATHILDA SAND- BERG, his Wife,	Defendants in Error.	

Petition for Rehearing

TO THE HONORABLE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT:

American Surety Company, plaintiff appellant, feeling itself aggrieved herein by the decision, judgment and opinion of this Court given and rendered on Monday, the 20th day of August, 1917, respectfully presents this its petition for rehearing and for cause and ground thereof doth respectfully show and present:

First:

The appellant submitted to this Court the particular features of the indemnity agreement or contract upon which the right of recovery was based, as follows, to-wit:

“VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose.”

* * * * *

“X. That the Surety also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for any-

thing due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

(See Record, pp. 24 to 26.)

covered by the 2nd Assignment of Error (Record, p. 257), and by the 12th Assignment of Error (Record, p. 261), and by the 29th Assignment of Error (Record, p. 268).

As well as in the assignments of the refusal of the Court to find the facts as requested in these particulars by the plaintiff and to make conclusions of law in these particulars as requested by the plaintiff.

The specific point being as set forth in the record as cited and in the brief (page 3 and following) and at pages 41, 44 and 45. The Court's attention is particularly directed to page 45 of the brief on this point.

The plaintiff in error respectfully submits that the Court's opinion goes upon the theory that because the lower Court has found certain facts and this Court is satisfied with the facts so found that the judgment is affirmed.

The trouble with this solution of the matter

is that the plaintiff in error submitted the legal proposition in two phases:

First:—If Sandberg did take as agent for the community indemnity then under his agreement with plaintiff in error that indemnity inured to it.

Second:—That when Sandberg as agent of the community signed the indemnity agreement saying that “such suretyship having been by the surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor’s property, its income and earnings,” and upon faith of such a statement the plaintiff in error did execute its bond and did incur liability that the Court as a matter of law was required to enforce that agreement regardless of any other feature of the case.

Second:

It was moreover submitted to your Honors that however much indemnity Sandberg took for his own protection that indemnity under clause VIII of the indemnity agreement was necessarily assigned to the plaintiff in error, for the language of that particular clause of the indemnity agreement signed by Sandberg is as follows:

“together with all other rights and remedies and demands which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the surety.”

The record in this Court was prepared to sub-

mit and we respectfully insist that it did submit the legal proposition that after the plaintiff in error had put in its documentary evidence that upon the indemnity agreement signed by Sandberg alone liability followed against the community by reason of clauses VIII and X set out on pages 2 and 3 of the brief heretofore submitted to the Court.

The Court in its opinion obviously has this matter in mind because it distinctly quotes Sections 5917 and 5918 of Remington's Code and Statutes of the State of Washington as to the husband's management and control of the community real and personal property.

Indeed, there is no doubt of the husband's authorized agency by statute to act in all respects for the community.

Third:

So the proposition which is not decided or disposed of by this Court in its opinion filed on the 20th day of August herein is:

Whether as matter of law the husband who as agent for a community estate managing all of its property, and the evidence confessedly establishing that there was no other property whatsoever and that the husband had no individual property of his own, can with the solemnity with which these engagements were intered into sign a declaration, contract and statement of the weight and character herein appearing without any effect to bind the community?

What indemnity amounts to will always remain an open question in Washington unless this question is decided.

It is respectfully submitted that this question has not been decided on the record submitted to this Court.

Moreover, the attention of your Honors is respectfully asked to consider that when a court tries a case sitting as a jury its findings of fact are not entitled to any more sanctity or respect than those of a jury under similar circumstances.

In this case there were and are many assignments of error distinctly calling this Court's attention to the action of the Court below in excluding evidence from consideration which showed or tended to show or establish the contrary of the very things which the Appellate Court now says in its opinion were found by the trial Court.

Fourth:

This Court adopts the findings of the Court below apparently without consideration of the following assignments of error:

The third assignment which presented the matter that the Court rejected evidence of the knowledge of Mathilda Sandberg.

The fourth assignment that the Court rejected evidence of Mathilda Sandberg derived from her admissions made in interrogatories.

The seventeenth assignment relating to the rejection of evidence and in considering improper evidence.

The eighteenth assignment concerning the

Court's error in refusing to consider the testimony of the witness, Lund.

The nineteenth to twenty-third assignments of error relate likewise to rejection by the Court of competent evidence.

The twenty-fourth assignment of error (record, p. 265) sets forth *in extenso* the very proceedings which related to the matter of Peter Sandberg's actual holding of the stock in the Wells Construction Company and the delivery of it to his attorneys, Messrs. Bates, Peer & Peterson, who are confessedly the attorneys of Mrs. Sandberg. (Record, p. 266; middle of p. 195).

The application of these assignments of error referred to and which it seems the Court has entirely overlooked are very readily illustrated by examination of the proceedings on record, pages 183 to 191.

The Court's attention is particularly called to the matter on page 189 of the record.

The twenty-fifth and twenty-sixth assignments of error raise the specific questions on findings tendered to the Court and refused by the Court; conclusions of law tendered and refused by the Court; and exceptions to failure so to find and in finding as the Court did.

It is therefore respectfully submitted as impossible to conceive how this Court, without passing upon these questions, could, if it had examined the record, affirm all these proceedings and find no error.

It is thought that the Court, in writing the opinion that it has written, could not have investigated these questions because nothing is said

about them in the opinion save in so far as they are covered by the general statement in the opening words, "*We find no ground to disturb the findings of fact of the court below,*" and in the closing words, "*Upon the facts as found by the court below, and the law as it is established in the State of Washington, we find no error in the decree which is appealed from*"; both of which propositions, however, entirely disregard succinct and pointed references to refusals to consider testimony to disregard offers to show facts upon which the opinion now turns and to consider course of proceedings which were prejudicial to the plaintiff in error.

If the Court will take the pains to examine (as it may not yet have had time to have done) record, pages 245, 247, 249, 250 and 251, there will appear proceedings upon the very matters upon which the opinion for affirmance has turned and from which it will appear that the action of the Court below was prejudicial to the plaintiff.

If for no other reason by the action of the Court below in excluding testimony relative to Mathilda Sandberg's knowledge and in excluding the testimony of Lund on the very points that the opinion of the Court now turns there should be a rehearing; and it is so respectfully requested and submitted.

WILLIAM C. BRISTOL,

August 27, 1917.

Attorney for Appellant.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA, }
 State and District of Oregon. } ss.

I, the undersigned, do hereby certify that I am counsel for the appellant, petitioner for rehearing in the above entitled cause and Court; that I prepared the foregoing petition for rehearing and that it is not interposed for delay, inconvenience or embarrassment; that in my judgment the grounds and reasons therein stated for the rehearing are well founded.

WILLIAM C. BRISTOL,
 Counsel for Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BADER GOLD MINING COMPANY, a Corpora-
tion,

Appellant,

vs.

ORO ELECTRIC CORPORATION, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

Filed

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F. D. Monckton,

No. 2966

United States
Circuit Court of Appeals
For the Ninth Circuit.

BADER GOLD MINING COMPANY, a Corpora-
tion,

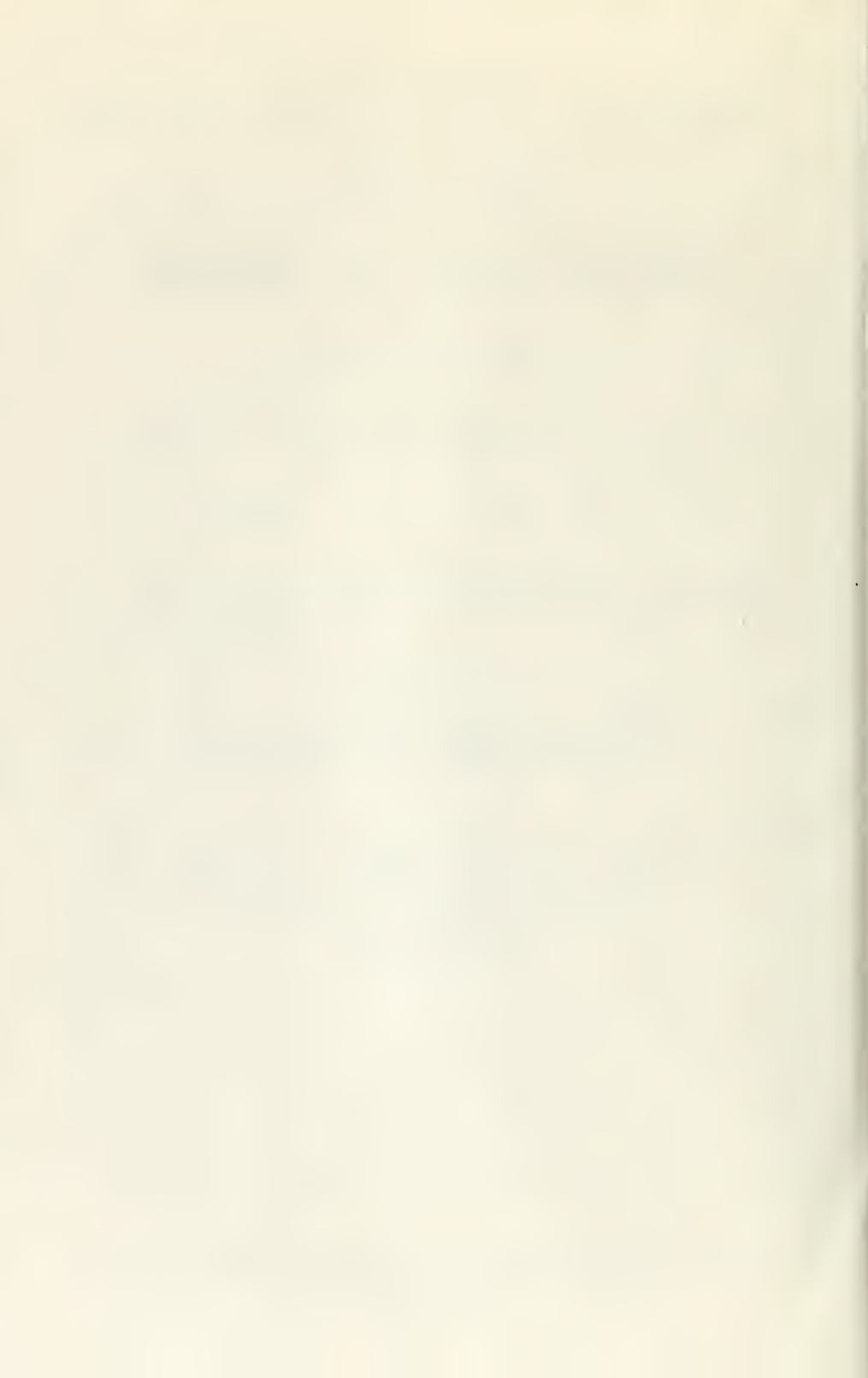
Appellant,

vs.

ORO ELECTRIC CORPORATION, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

No. 2966.

BADER GOLD MINING COMPANY,

Defendant and Appellant,

vs.

ORO ELECTRIC COMPANY,

Plaintiff and Respondent.

Stipulation Omitting Portions of Record.

It is hereby stipulated by and between the parties to the above-entitled action that the following portions of the record may be omitted from the said record when printed:

1. 11 orders under rule 16 enlarging time to April 16, 1917, to file record and docket case, which orders are included in one manuscript back and endorsed: "Re-filed April 3, 1917."

2. Writ of Injunction found on pages 88, 89 and 90 of the original certified record.

3. Return of service of Writ found on pages 91 and 92 of the original certified record.

4. Praecipe on appeal found on pages 356 and 357 of the original certified record.

5. Stipulations and orders enlarging time to file record and docket case found on pages 358 and 360 of the original certified record.

Dated May 1, 1917.

R. H. CROSS,

H. H. BRANDT,

Attorneys for Defendant and Appellant.

GOODFELLOW, EELLS, MOORE &
ORRICK,

Attorneys for Plaintiff and Respondent.

[Endorsed]: No. 2966. U. S. Circuit Court of Appeals, Ninth Circuit. Bader Gold Mining Co., Appellant, vs. Oro Electric Company, Respondent. Stipulation Omitting Portions of Record. Filed May 3, 1917. F. D. Monekton, Clerk.

*In the District Court of the United States, Northern
District of California, Second Division.*

ORO ELECTRIC CORPORATION, a Corpora-
tion,

Complainant,

vs.

BADER GOLD MINING COMPANY, a Corpora-
tion,

Defendant.

Bill of Complaint.

To the Judges of the District Court of the United States, Northern District of California:

The complainant above named, Oro Electric Corporation, a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the city and county of San Francisco, in said State, and a citizen of said State, and a resident of the Northern District thereof,

brings this its bill of complaint against the above-named defendant, Bader Gold Mining Company, a corporation organized and existing under the laws of the State of South Dakota, and a citizen of said State of South Dakota, and thereupon your orator complains and says:

I.

That your orator is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the city and county of San Francisco, in said State, and that it is, and at all of said times was a citizen of the State of California, and a resident of the Northern District of said State.

II.

That defendant is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of South Dakota, and a citizen of the State of South Dakota. [1*]

III.

That your orator was incorporated, as aforesaid, for the purpose of engaging in the business of generating and producing by water power or other means, electric current for light, heat and power, and of transmitting, distributing, selling and supplying the same to the public; and of supplying, selling and distributing water to the public for irrigation, domestic and other beneficial purposes; and that it is, and for a long time last past has been, and at the time of

*Page-number appearing at foot of page of original certified Transcript of Record.

the commission of the acts of defendant hereinafter complained of was, engaged in said business.

IV.

That for the purpose of carrying on its said business your orator has acquired, and now owns, and at all of said times owned, two hydro-electric power plants, known respectively as Lime Saddle and Coal Canon Power Plants, both situated in the county of Butte in said State of California, and various electric transmission and distribution lines connected therewith, by means of which electricity generated by your orator at said plants is and at all of said times was transmitted to and distributed among the customers of your orator living in the city of Oroville and elsewhere in the county of Butte, in said Northern District of California; and that said electricity is, and at all of said times was, used and consumed by said customers for the purpose of light, heat and power.

That for the purpose of carrying on its said business, your orator has also acquired, and it now owns and possesses, and at all of said times owned and possessed, a certain water ditch in said county of Butte in said Northern District of California, known as the Nickerson Ditch, which ditch extends in a general Southerly and Southwesterly direction from its intake at Little Butte Creek in the northeast quarter of section 36, township 23 north, range 3 east, Mount Diablo Base and Meridian, through sections one, two, eleven, twelve and thirteen, in township 22 north, [2] range 3 east, and sections eighteen, nineteen and thirty in township 22 north, range 4 east, Mount

Diablo Base and Meridian to the Kunkle Reservoir in section thirty-one, township 22 north, range 4 east, Mount Diablo Base and Meridian; and that your orator uses said ditch during the summer season of each year for the purpose of distributing water to its customers for irrigation, domestic and other useful purposes, and during the other seasons of the year for the purpose of conveying water to said Kunkle reservoir for use in operating said power plants.

• V.

That defendant asserts some claim in and to that portion of said ditch situated in section 36, township 23 north, range 3 west, M. D. B. & M., and sections 1 and 2, township 22 north, range 3 east, M. D. B. & M., and claims the right to enter upon said ditch and take water therefrom without making compensation to your orator therefor, and defendant has at divers times during the months of April, May, June, July, August, September and October, 1912, repeatedly and without right, and against the command of your orator, forcibly entered upon and opened said ditch at a point in the southeast quarter of the northwest quarter of section one, township 22 north, range 3 east, M. D. B. & M., and injured the banks thereof and taken large quantities of water therefrom without making or tendering any compensation to your orator therefor. That much of the water so taken from said ditch has been wasted.

VI.

That said claims of defendant are, and each of them is, without right or foundation, and that as a direct result of said acts of defendant the operation

of said power plants has been seriously interfered with, and the customers of your orator supplied with water from said ditch for irrigation, domestic and other beneficial purposes, as aforesaid, have been deprived of water required by them, and your orator has been greatly damaged. [3] That the precise amount of damage so sustained by your orator cannot be ascertained, but, upon information and belief, your orator alleges that the same exceeds the sum of Three Thousand (3,000) Dollars; and that the value of the interest claimed by defendant, as aforesaid, in the above-described portion of said ditch, and likewise the value of the rights of your orator therein which are sought to be protected by the injunction herein prayed, greatly exceeds said last named sum.

VII.

That defendant threatens to continue to assert said claims and to continue to so enter upon and interfere with said ditch and to take water therefrom against the consent of your orator and without making compensation therefor, and will continue so to do unless restrained by the injunction and order of this Honorable Court. And your orator further alleges, upon information and belief, that if said acts are so continued the operation of said power plants will continue to be seriously interfered with, and your orator will be unable to supply its said customers with the water required by them, and will thereby be subjected to a multiplicity of suits at their hands and will be irreparably damaged and injured.

VIII.

That the matter in dispute in said suit exceeds, ex-

clusive of interest and costs, the sum and of Three Thousand (3,000) Dollars.

IX.

That your orator has no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE, your orator prays that your Honors may adjudge and decree that the said claims of said defendant, Bader Gold Mining Company, are invalid and without right; that said defendant has [4] no estate, right, title or interest in or to said ditch, and no right to take water therefrom; that your orator is the owner of said ditch, and that said defendant be forever restrained and enjoined from asserting any claim thereto, or any estate or interest therein, or from entering upon, or in any way interfering with said ditch or taking water therefrom; that your orator recover from defendant the said sum of Three Thousand (3,000) Dollars, and that your orator may have such other and further relief in the premises as to the Court may seem meet, together with its costs and expenses in this behalf incurred.

And may it please your Honors to grant unto your orator a writ of subpoena, issued out of and under the seal of this Honorable Court to said defendant, the Bader Gold Mining Company, commanding it on a certain day and under a certain penalty in said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises, an answer under oath being hereby expressly waived; and further to stand

and abide by and perform such further orders, directions and decrees herein as your Honors shall deem meet and shall be agreeable to equity and good conscience.

And your orator will ever pray.

Dated November 19th, A. D. 1912.

GOODFELLOW, EELLS & ORRICK,
Solicitors for Complainant. [5]

State of California,

City and County of San Francisco,—ss.

J. W. Goodwin, being duly sworn, deposes and says, that he is president of Oro Electric Corporation (a corporation), the complainant in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

J. W. GOODWIN.

Subscribed and sworn to before me this 18th day of November, A. D. 1912.

[Seal]

N. E. W. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Nov. 19, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,620.

ORO ELECTRIC CORPORATION, a Corporation,
Plaintiff,

vs.

BADER GOLD MINING CO., a Corporation,
Defendant.

Answer to Bill of Complaint.

Now comes defendant and answers plaintiff's bill of complaint herein as follows:

I.

Defendant admits the facts alleged in paragraphs I and II of plaintiff's bill of complaint.

II.

Defendant is without knowledge of the facts alleged in paragraphs III and IV of plaintiff's bill of complaint.

III.

Defendant admits that it asserts a claim in and to that portion of the Nickerson Ditch as described in plaintiff's bill of complaint, and situated in section 36, township 23 north, range 3 east, M. D. B. & M., and in section 1, township 22 north, range 3 east, M. D. B. & M.; denies that it asserts any claim to any portion of said ditch in section 2, township 22 north, range 3 east, M. D. B. & M.; admits that it claims the right to enter upon said ditch and take water therefrom without making compensation to plaintiff

therefor; denies that it has entered or did enter at divers times during the months of April, May, June, July, [7] August, September and October, 1912, or at any other time, upon said ditch, and opened or opened said ditch at the point alleged in said bill of complaint, or at any other point thereon, except as hereinafter alleged, and defendant denies that it injured the banks of said ditch as in said bill of complaint alleged, or otherwise or at all; defendant admits that it has taken large quantities of water from said ditch without making or tendering any compensation to plaintiff, and defendant denies that much or any of said water taken from said ditch has been wasted.

IV.

Defendant denies that the claims of defendant are or is without right or foundation; defendant alleges that it is without knowledge of the facts in paragraph VI of said bill of complaint, wherein it is alleged "That as a direct result of said acts of defendant, the operation of said power plants has been seriously interfered with, and the customers of your orator supplied with water from said ditch for irrigation, domestic and other beneficial purposes, as aforesaid, have been deprived of water required by them, and your orator has been greatly damaged"; defendant is without knowledge of the facts in paragraph VI of said complaint wherein it is alleged "That the precise amount of damage so sustained by your orator cannot be ascertained"; defendant denies that the damage sustained by plaintiff exceeds the sum of \$3,000, or any sum, or that plaintiff is

damaged at all, and defendant further denies that the value of the rights of plaintiff in said ditch which are sought to be protected by the relief demanded in this action, exceeds the sum of \$3,000, or any other sum.

V.

Defendant admits that it will continue to assert said claims and will continue to enter upon said ditch and take water [8] therefrom without making compensation therefor, unless restrained by an injunction and order of this Honorable Court; defendant is without knowledge of the facts in paragraph VII of said complaint wherein it is alleged "That if said acts are so continued the operation of said power plants will continue to be seriously interfered with, and your orator will be unable to supply its said customers with the water required by them, and will thereby be subjected to a multiplicity of suits at their hands and will be irreparably damaged and injured."

For a further and second defense, defendant alleges:

I.

That defendant is now and ever since on or about the 17th day of March, 1899, has been, through and by its grantors and predecessors in interest, the owner of the right to use and in possession of the use thereof, of 500 miner's inches of water flowing in Little Butte Creek, Butte County, California, to be diverted therefrom at a point commonly known as "The old Thompson Flat or Delaplain Ditch-Head Dam," on section 36, township 23 north, range 3

east, M. D. & B. M., and conducted therefrom through a flume and ditch in a southerly direction across a portion of said section 36, and across a portion of section 1, township 22 north, range 3 east, M. D. B. & M., to the place of use at defendant's mine, located on the northeast quarter of said section 1; that defendant, during all of said times since on or about the 17th day of March, 1899, has used said 500 miner's inches of water in its business of mining at said mine, and except as hereinafter alleged, has conducted the said water through said flume and ditch of defendant. [9]

II.

That defendant's said ditch headed on Little Butte Creek below the head of the Nickerson Ditch as described in plaintiff's bill of complaint herein; that plaintiff since about the year 1888, the exact date not being known to defendant, has been by itself and its predecessors in interest, as defendant is informed and believes, in possession of and in enjoyment of an easement to maintain that certain water ditch known as the "Nickerson Ditch," and described in plaintiff's bill of complaint herein, across lands of this defendant, and other owners of adjoining lands; that the said Nickerson ditch was built and for a long time maintained for the purpose of taking from Little Butte Creek, water emptied therein above the head of said Nickerson Ditch by the Snow Water Ditch; that said Snow Water Ditch conducted water to Little Butte Creek from a source without the watershed of Little Butte Creek.

III.

Defendant further alleges that the said Nickerson Ditch heads on Little Butte Creek above said ditch of defendant; that during the summer of 1906, the exact date not being known to defendant, plaintiff enlarged the said ditch at the head thereof, and did, thereupon unlawfully and without right, divert all the water from Little Butte Creek so that no water flowed therein to the head of defendant's ditch, thereby depriving defendant from the use of said 500 miner's inches of water owned by it; that immediately and thereupon, defendant recaptured its said water flowing in said Nickerson Ditch by opening a gateway therein, and letting run therefrom, water only sufficient for its use, not to exceed in quantity 500 miner's inches; that the use of the Nickerson Water Ditch by defendant for the purpose of conducting [10] defendant's water from Little Butte Creek to defendant's mine, has continued from the time the said Nickerson Ditch was enlarged in the summer of 1906, to the date of the commencement of this suit on the 19th day of November, 1912, and that the capacity of said Nickerson Ditch is now and has been ever since the summer of 1906, 4000 miner's inches.

IV.

That upon the diversion of defendant's water from Little Butte Creek by plaintiff, as aforesaid, defendant's flume and ditches fell out of repair by and on account of no water flowing through them, and by disuse, and that said flume and ditches have thus been damaged in the sum of \$5,000.

For a separate and third defense, defendant alleges:

I.

That the plaintiff is in possession of said Nickerson Ditch, and is the owner of an easement to maintain the same across the land of this defendant and other adjoining property owners, in section 36, township 23 north, range 3 east, M. D. B. & M., and section 1, township 22 north, range 3 east, M. D. B. & M.; that said plaintiff owns no land in either of said sections, across which said ditch extends; that this defendant has at no time used said Nickerson Water Ditch for a purpose inconsistent with the enjoyment of the said easement possessed by plaintiff.

For a separate and fourth defense, defendant alleges:

I.

That plaintiff's cause of action is barred by the provisions of sections 318, subdivision 2 of section 338, subdivision 1 of section 339 and section 343 of the Code of Civil Procedure of the State of California. [11]

For a separate and fifth defense, defendant alleges:

I.

That plaintiff is guilty of laches in that it did not bring this action within a reasonable time after the commencement of the acts of defendant complained of.

For a separate and sixth defense, defendant alleges:

I.

Defendant alleges that it has been in the quiet, open and continuous possession of the right to con-

duct through said Nickerson Ditch, said 500 miner's inches of water to the use of which this defendant was and now is entitled, and to take the same from said ditch at the point thereon near defendant's mine, at which point defendant has been taking said water, holding and claiming said right adversely to all other persons, under a claim of legal right so to do for more than five years before the commencement of this action.

For a further and separate answer, and by way of counterclaim, defendant alleges:

I.

That the plaintiff is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the City and County of San Francisco, in said State, and that it is and at all of said times was a citizen of the State of California and a resident of the Northern District of said State.

II.

That defendant is and at all the times herein mentioned was a corporation duly organized and existing under the [12] laws of the State of South Dakota, and a citizen of the said State of South Dakota.

III.

That defendant is now and was at the commencement of this suit, and for more than five years before that time, and from thence up to that time, had been in the adverse, continuous, open and peaceable possession and occupancy under a claim of legal

right of the right to use a portion of a certain water ditch in the county of Butte, in said Northern District of California, known as the "Nickerson Ditch," which ditch extends in a general southerly and southwesterly direction from its intake at Little Butte Creek in the northeast quarter of section 36, township 23 north, range 3 east, M. D. B. & M., through Section 1, township 22 north, range 3 east, M. D. B. & M., said portion of said ditch lying between the head thereof and an outlet gate in the bank thereof about one and one-half miles along said ditch from the head thereof, at which gate this defendant has taken water for its use, and that said portion of said Nickerson Ditch has a capacity of 4,000 miner's inches of water measured under a four-inch pressure.

That said plaintiff has not any right, title, interest or right of possession in or to said use of said water ditch by this defendant or any part of the portions thereof used by this defendant; that the said plaintiff claims to have some right, title, interest or right of possession in or to said use by this defendant, adverse to this defendant, but whatever it may be the same is against the rights of this defendant, and is without foundation, and is a cloud upon the defendant's right and occupancy in and to said uses. [13]

WHEREFORE defendant prays that plaintiff take nothing by this action, and that the use of the said portion of said ditch may, by the decree of this court, be declared valid, and that the plaintiff be perpetually restrained and enjoined from setting up

or making any claim to or upon the said use thereof by this defendant, for the sum of \$5,000 damages, and for such other or further order, decree or judgment as may be just and equitable to this defendant.

R. H. CROSS,
Attorney for Defendant. [14]

State of California,
City and County of San Francisco,—ss.

J. H. Sayre, being first duly sworn, deposes and says: That he is an officer of defendant Bader Gold Mining Co., to wit, secretary thereof, and makes this affidavit on its behalf. That he has read the foregoing answer, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

J. H. SAYRE.

Subscribed and sworn to before me this 21st day of March, 1913.

[Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within this 25th day of March, 1913, is hereby admitted.

GOODFELLOW, EELLS & ORRICK,
Solicitors for Complainant.

[Endorsed]: Filed Mar. 25, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

At a stated term, to wit, the March term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 5th day of May, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,620.

ORO ELECTRIC CORPN.

vs.

BADER GOLD MINING CO.

(Order Referring Cause to Master.)

Pursuant to the oral stipulation of counsel for the respective parties herein, made in open court, it was ordered that the motion to strike out parts of answer and the cause be and the same is hereby referred to H. M. Wright, Esq., Master in Chancery, to take and report the testimony together with his findings and conclusions thereon. [16]

*In the District Court of the United States, Northern
District of California, Second Division.*

#15,620.

ORO ELECTRIC CORPORATION,

Plaintiff,

vs.

BADER GOLD MINING COMPANY,

Defendant.

Plaintiff's Reply to Counterclaim.

Now comes the plaintiff in the above-entitled cause, and for its answer and reply to the counterclaim set forth in defendant's answer herein, alleges, admits and denies as follows:

Denies that defendant is, or was at the commencement of said action, or for more than five years before that time, or from thence up to that time, or at any other time, has been in the adverse, or continuous or open, or peaceable, or other possession or occupancy under a claim of legal or other right, or otherwise of the right to use the portion of the Nickerson Ditch in said counterclaim referred to, or any portion thereof.

Alleges that it has no information or belief to enable it to answer the averment in the said counterclaim contained, to the effect that said ditch at said gate has a capacity of four thousand (4,000) miner's inches measured under a four-inch [17] pressure, and basing its denial upon that ground denies said allegation.

Denies that plaintiff has not any right, title, interest or right of possession in or to said use of said ditch by it, or to any part of the portions of said ditch referred to in said counterclaim; and in this behalf alleges that plaintiff is, and at all times in the bill of complaint herein mentioned was, the exclusive owner of said ditch.

Admits that plaintiff claims to have some right, title, interest and right of possession in and to said ditch and the use thereof, adverse to defendant, and

admits that the same is against the claimed right of said defendant; but denies that said claim of plaintiff is without foundation, or is a cloud upon any right or title of defendant.

WHEREFORE, plaintiff prays that this Court make and enter its decree herein in accordance with the prayer of the bill of complaint on file herein.

GOODFELLOW, EELLS & ORRICK,
Solicitors for Plaintiff.

State of California,
City and County of San Francisco,—ss.

E. B. Bumsted, being duly sworn, deposes and says, that he is an officer, to wit, the vice-president, of Oro Electric Corporation, the plaintiff in the above-entitled action; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

E. B. BUMSTED.

Subscribed and sworn to before me this 12th day of May, A. D. 1913.

[Seal]

M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [18]

Service of a copy of the within is hereby acknowledged this 12th day of May, A. D. 1913.

R. H. CROSS,
Attorney for Defendants.

[Endorsed]: Filed May 12, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,620—IN EQUITY.

ORO ELECTRIC CORPORATION (a Corpora-
tion),

Plaintiff,

vs.

BADER GOLD MINING COMPANY (a Corpora-
tion),

Defendant.

**Master's Report on Motion to Strike Out Parts of
the Answer and Upon Final Hearing.**

To the Honorable, The Judges of the United States
District Court for the Northern District of Cali-
fornia.

The report of H. M. Wright, Standing Master in
Chancery of this court, respectfully shows:

This was a reference made by consent of counsel
for both parties on May 5, 1913. The order of ref-
erence included the determination of plaintiff's
motion to strike out parts of the answer, and also
the final hearing of the cause, with directions "to take
and report the testimony together with the Master's
findings and conclusions thereon." A certified copy
of this order of reference is annexed to this report.

Accordingly, within a few days of the order of
reference, I was attended by W. H. Orrick, Esq.,
attorney for plaintiff, [20] and R. H. Cross, Esq.,
attorney for defendant. At this session the motion
to strike out was argued and submitted, and the final

hearing of the cause set for a day in either May or June, 1913, the exact date not being within my recollection. On May 20, 1913, the motion to strike out was denied, and the substance of the Master's order will be found on page 2 of the transcript accompanying this report and will be hereafter referred to. Shortly prior to the day for final hearing, at the request of counsel for both parties, the hearing was indefinitely postponed.

Thereafter, on September 28, 1914, I was attended by W. H. Orrick, Esq., for the plaintiff and R. H. Cross, Esq., and Arthur H. Brandt, Esq., for the defendant. Evidence on final hearing was taken on September 28, and the 29th, 30th, October 1st, 2d, 3d, 5th, 6th and 7th, 1914. On this latter day the evidence was closed. By consent of counsel and pursuant to the directions of the order of reference the testimony and proceedings were taken in shorthand by E. W. Lehner and Charles R. Gagan, competent and disinterested reporters appointed by the Master, and by them transcribed. Said transcript in nine pamphlet volumes is a true transcript, and is herewith separately returned. During the progress of the proceedings documentary evidence was offered and received in evidence marked as follows: Plaintiff's Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12. Defendant's Exhibits, "A," "B," "C," "D," "E," "F," "G," "H" and "I." Since the submission I have marked as Plaintiff's Ex. 1 for identification a certain blue-print map not offered in evidence but referred to by some of the witnesses in the early days of the hearing. Plaintiff's Ex. 2 for identifica-

tion and Ex. 3 for identification were offered and rejected. All of said exhibits are herewith separately returned. The said transcript and the said exhibits constitute all the evidence in said cause. After the conclusion of the taking of evidence the cause was orally argued by Mr. Orrick and Mr. Brandt, and by permission of the Master briefs were filed on [21] October 23, 1914, by both parties, and the cause was thereupon submitted for the Master's consideration and report. The said brief by the plaintiff, and a brief and summary of evidence submitted by defendant's counsel are also separately returned for the information of the Court.

REPORT ON MOTION TO STRIKE OUT.

As stated, on May 20, 1913, plaintiff's motion to strike out the second defensive allegation of the defendant's answer was denied. In my decision (Tr., p. 2), I stated:

"That the plaintiff is in error in regarding the matter in question as a counterclaim. It is not so stated and on familiar principles will not be so regarded. It will, therefore, not be regarded as a cross action asking damages. I see nothing in the defense other than an attempt to set up a defense of laches, or, it may be, an allegation affecting the equity of plaintiff's demand for an injunction under the circumstances."

This ruling is now for the first time brought to the attention of the Court for review. While I see no reason to doubt the essential correctness of this ruling, I am of the opinion that for practicable pur-

pose of defining the issues for trial it would have been better had the motion been granted, and a clearer statement of the defense been attained. At that time, however, I was partly influenced by the fact that the cause was about to be tried and that undue delay in settling pleadings should be avoided. My conclusion was not reported to the Court for its determination prior to the final hearing before me, and the case was tried on the pleadings as settled by the ruling in question. It is accordingly proper that I should report to the Court my conclusion to the effect that the motion to [22] strike out should be denied.

REPORT ON FINAL HEARING.

The bill of complaint herein was filed on Nov. 19, 1912. The answer was filed on March 25, 1913. A reply to the counterclaim set forth in the answer was filed by plaintiff on May 12, 1913. The purpose of the suit was to secure an injunction against interference by the defendant with a water ditch extending in part through defendant's lands in Butte County, in the Northern District of California. The record will show that the pleadings were not in such shape that the issues were sharply defined in the minds either of counsel or the Master. In consequence my careful consideration of the matter since the submission shows that a good deal of the evidence received was not in fact relevant. Before reviewing the evidence I have found it necessary to analyze the pleadings. And to the end that the Court may be placed in the Master's position it is necessary, first, to set forth an analysis of the

pleadings, and from that to determine and set forth the questions here at issue before proceeding with a statement of the evidence.

ANALYSIS OF THE PLEADINGS.

The bill in its first paragraph sets forth the corporate capacity of the complainant as a corporation of California, and its residence in the Northern District, and in the second paragraph the corporate capacity of defendant as a corporation of South Dakota, and a citizen of that State. These allegations are admitted by the answer.

The third paragraph, in brief, alleges that the plaintiff is and was at all material times a public utility corporation distributing water and electric current. The answer denies this allegation for lack of knowledge under Rule 30 of the equity rules of the Supreme Court. The facts were, however, [23] admitted at the hearing (Transcript, 13).

The fourth paragraph of the bill begins by stating the ownership by plaintiff of two hydro-electric plants serving the city of Oroville and other points in Butte County, and that for the purpose of carrying on its business "it now owns and possesses, and at all of said times owned and possessed, a certain water ditch in said county of Butte, in said Northern District of California, known as the Nickerson Ditch, which ditch extends in a general southerly and southwesterly direction from its intake at Little Butte Creek" at a point described by Government subdivisions, thence through defendant's land, likewise particularly described, and elsewhere; "that your orator uses said ditch during the summer sea-

son of each year for the purpose of distributing water to its customers for irrigation, domestic and other useful purposes, and during the other seasons of the year for the purpose of conveying water to said Kunkle Reservoir for use in operating said power plants." The allegations of paragraph four are likewise denied by the answer in paragraph two for lack of knowledge.

Paragraph five of the bill describes the wrong of defendant, complained of as follows: "That defendant asserts some claim in and to that portion of said ditch situated in section 36, township 23 north, range 3 west, M. D. B. & M., and section 1 and 2, township 22 north, range 3 east," M. D. B. & M., these being the subdivisions marking the course of the ditch across defendant's land and above that to the intake, and "claims the right to enter upon said ditch and take water therefrom without making compensation to your orator therefor, and defendant has at divers times during the months of April, May, June, July, August, September and October, 1912, repeatedly and without right, and against the command of your orator, forcibly entered upon and opened said ditch at a point in the [24] southeast quarter of the northeast quarter of section 1, township 22 north, range 3 east, M. D. B. & M., and injured the banks thereof and taken large quantities of water therefrom without making or tendering any compensation to your orator therefor. That much of the water so taken from said ditch has been wasted."

Stated in condensed form, the answer in paragraph three thereof admits that the defendant as-

serts a claim to the portion of the ditch above its spillway; that it claims the right to enter upon said ditch and take water therefrom without making compensation to plaintiff therefor; denies the acts of entry "except as hereinafter alleged"; denies injury to the banks; admits taking large quantities of water without compensation, but denies that much or any of said water has been wasted.

In paragraph six the complaint makes the usual formal allegations that defendant's claims are without right; alleges damage by defendant's acts in the sum of \$3,000, and alleges that the matter in controversy exceeds \$3,000 in value. In paragraph four of the answer these allegations are denied, but in the opening statement the jurisdictional amount was admitted to be involved by defendant's counsel, and the subsequent proof clearly determines that the matter here in controversy exceeds \$3,000, exclusive of interest and costs.

In paragraph seven the complaint sets forth defendant's threats of future interference with the ditch and continued damage. The answer admits that the defendant will continue to assert its claims and to enter upon the ditch.

Paragraph eight of the complaint makes the formal allegation that the matter in dispute exceeds, exclusive of interest and costs, the sum and value of \$3,000.

Paragraph nine of the bill makes the usual allegation that no plain, speedy or adequate remedy exists at law. The answer [25] is silent, and these allegations must be deemed admitted.

The prayer of the bill asks the decree of this Court that the defendant's claims are invalid and without right; that defendant has no estate, right, title or interest in or to said ditch, and no right to take water therefrom; that plaintiff is the owner of said ditch; that defendant be enjoined from asserting any claim thereto, or any interest therein, or from entering upon or in any way interfering with said ditch, or taking water therefrom; that plaintiff be awarded damages and such general relief as may seem to the Court proper.

At this point in the analysis of the pleadings, before analyzing the further defensive allegations of the answer, it is convenient to refer to the Master's ruling on the first day of the trial requiring the defendant to go forward with the production of evidence.

On the first day, during the statement of the case, defendant's counsel admitted the allegations of paragraph four involving, among other things, plaintiff's allegation of its right of way across the defendant's land for a water ditch, but restricted the admission with a limitation to the effect that the plaintiff must show the extent of this right in definite measures of water (Tr., pp. 14, 17 and following). Counsel also admitted the acts of entry upon the ditch, but asserted the rightfulness of their entry, and denied any waste of water. The jurisdiction of the Court was admitted. Thereupon the defendant rested its *prima facie* case, and defendant then moved to dismiss the proceeding on the ground that the mere contention that plaintiff had an easement for a ditch was

not sufficient. It was their contention that the amount of water which the right of way affected was a necessary element in plaintiff's proof, and that defendant could take its own water through plaintiff's ditch and therefrom divert [26] it in the absence of a showing by plaintiff that defendant's use was inconsistent with the easement. It was also admitted by defendant that the question of title to the water was not in question in this case at all (Tr., p. 12). After consideration defendant's motion was denied. I was and I am of the opinion that upon the admissions in the pleadings and at the hearing it was shown that plaintiff owned a right of way for water across defendant's land, that defendant had interfered with that right of way by obstructing it and by taking water out of it, and would continue to do so under a claim of right. This constituted a trespass and threat of continued future trespasses making a *prima facie* case for the plaintiff. It then became incumbent, in my view, upon the defendant to justify the trespass. Defendant's contention that plaintiff must prove the quantity of water covered by his easement will be hereafter more fully discussed. While I see no error in the ruling requiring the defendant to go forward with the evidence, it must be pointed out that the ruling did not touch the question of the ultimate burden of proof, which, of course, remained with the plaintiff. Furthermore, if there was any error in the ruling, it simply affected the order of proof, which was in the discretion of the Master; and if any harm was thereby done to defendant's presentation it was remedied by

the Master's liberality in allowing defendant to offer full proofs in later stages of the hearing.

Continuing the analysis of the pleadings the answer contained in addition to the traverses already mentioned a number of defensive allegations and a counterclaim.

"For a further and second defense" the answer alleges that since March 17th, 1899, the defendant and its grantors have owned the right to use and have been in possession of the use of 500 inches of water flowing in Little Butte Creek, to be [27] diverted therefrom at a point known as the "Old Thompson Flat or Delaplain ditch head dam" situated on section 36, and conducted therefrom through a ditch to defendant's mine in the northeast quarter of section 1; that defendant ever since has used said 500 inches of water, and except as hereinafter alleged has conducted the water through its own ditch.

This ditch headed below the head of the Nickerson Ditch described in the bill of complaint.

The second paragraph alleges that since 1888 the plaintiff has been in possession of and in enjoyment of "an easement to maintain that certain water ditch known as the Nickerson Ditch, and described in plaintiff's bill of complaint, across lands of this defendant, and other owners of adjoining lands"; that said ditch was built and for a long time maintained for the purpose of taking Little Butte Creek water which had been emptied therein by a certain ditch known as the "Snow Ditch," which proceeded from a source outside the water shed of Little Butte Creek.

The third paragraph alleges that during the summer of 1906 plaintiff enlarged the Nickerson Ditch at its head and diverted all the water from Little Butte Creek, thereby depriving the defendant the use of the 500 inches which it had appropriated; "that immediately and thereupon defendant recaptured its said water flowing in said Nickerson Ditch by opening a gateway therein, and letting run therefrom water only sufficient for its use, not to exceed in quantity 500 miner's inches"; that defendant has in this way used the Nickerson Ditch from the summer of 1906 to the beginning of the suit; that the capacity of that ditch ever since 1906 has been 4,000 inches.

The fourth paragraph of the second defense alleges that after plaintiff diverted defendant's water, defendant's flume and ditches fell out of repair for lack of water, and by disuse [28] "and that said flume and ditches have thus been damaged in the sum of \$5,000."

For a third defense the defendant alleges plaintiff's possession of the Nickerson Ditch and ownership "of an easement to maintain the same across the land of this defendant"; that plaintiff owns no land along the line of the ditch; and "that this defendant has at no time used said Nickerson water ditch for a purpose inconsistent with the enjoyment of the said easement possessed by plaintiff."

As a fourth defense defendant pleads the statute of limitations, section 318, section 338, subdivision 2, section 339, subdivision 1, and section 343, Code of Civil Procedure of California.

The fifth defense pleads the laches of plaintiff in not beginning the suit within a reasonable time after the acts of the defendant complained of.

As a sixth defense the defendant alleges that "it has been in the quiet, open and continuous possession of the right to conduct through said Nickerson Ditch said 500 miner's inches of water * * * and to take the same from said ditch at the point thereon near defendant's mine," where it has been so taking it, holding and claiming said right adversely to all other persons, under claim of legal right for more than five years before the commencement of this action.

Finally, in a counterclaim, the defendant states its alleged prescriptive right in somewhat different form than in the sixth defense. The corporate capacity of the parties and other formal allegations are repeated. It is then alleged that for more than five years before the beginning of the present proceeding the defendant had been in the "adverse, continuous, open and peaceable possession and occupancy under a claim of legal right, of the right to use a portion of a [29] certain water ditch," describing the Nickerson Ditch, the portion referred to being that portion between the intake and defendant's spillway on its land. This portion is alleged to have a capacity of 4,000 miner's inches. It is alleged that plaintiff claims a right, but has none, to the use of said water ditch which defendant uses, and it is a cloud upon the defendant's right and occupancy in said use. The answer concludes with a prayer that the plaintiff take nothing; "that the use of the said

portion of said ditch'' by defendant shall be declared valid, and for an injunction against plaintiff's interference, for \$5,000 damages, and general relief.

No reply was filed covering the defensive allegations, but a reply was filed to the counterclaim putting its allegations in issue, other than those of the corporate capacity of the parties.

THE ISSUES MADE BY THE PLEADINGS.

There is no issue apparent on the ownership and possession by plaintiff and its predecessors at all relevant times of the Nickerson Ditch. Neither is there any issue on the allegation that defendant interfered with the easement thus possessed by plaintiff, both by diverting the water, which was the thing which gave meaning to the easement, and by obstructing the ditch. These facts, though specifically traversed, are in effect admitted, since the traverse is qualified by the words "except as hereinafter alleged, and thus incorporates allegations elsewhere in the answer where plaintiff's possession of the ditch and defendant's interference with it are expressly set forth. These facts were also admitted at the hearing as hereinbefore set forth.

2d. The first issue is that which is contained in the second defensive allegation, namely, admitting this ownership [30] and possession, was defendant justified in taking water from the ditch by reason of the fact that plaintiff diverted defendant's water into its ditch in 1906? Defendant's position is that he has a right to recapture the water thus diverted. If defendant was so justified, it might become material to determine whether the water was defendant's

water. In my ruling on the motion to strike this defense out I stated that possibly this second defense might be considered also as stating facts bearing on the question of laches and on plaintiff's inequity.

3d. On the same assumption of plaintiff's ownership and possession of the Nickerson Ditch the second issue presented by the third defense is: Was defendant justified in taking out his water on the doctrine of Hoyt vs. Hart as understood by defendant, namely, that defendant might do so if it was not inconsistent with plaintiff's easement, that is, if there was left in the ditch as much water as plaintiff was entitled to? If the point of law contended for by defendant is valid, then it would seem that the respective rights to water must be found. If not valid, then it is immaterial what rights to water by appropriation or otherwise either party has.

4th. The third issue presented by the fourth defense is: Has the statute of limitations run against plaintiff?

5th. The fourth issue presented by the fifth defense is whether the plaintiff has been guilty of laches.

6th. The fifth issue presented by the sixth defense, and also by the counterclaim is: Has defendant acquired the right to the use of a portion of the ditch by prescription? This issue does not seem to involve any question of ownership of water rights.

THE ISSUES OF LAW.

The complaint herein is evidently framed on the precedent afforded by the case of *Silver Creek vs. Hayes*, 113 Cal. 142, [31] where the opinion of

the Court was written by Justice Temple. Plaintiff alleges that it owns a ditch, and shows interference with that ditch both by diversion of water and obstruction of the ditch. The plaintiff, it will be noted, does not allege that it owns the water which flowed into that ditch. The question of ownership of water came into the case by reason of defendant's theory as to the law governing such matters, and in the course of the proceeding accordingly plaintiff replied with a large amount of evidence bearing on the question of its ownership of the water. The word "ditch" in ordinary parlance may mean two things: one, a right of way for water; two, the physical means by which this right is exercised. *N. C. & S. C. Co. vs. Kidd*, 37 Cal. 282. The second is the restricted sense, referring to the instrument by which the right of way is made effective, and secondarily, in a more restricted sense, distinguishing the open conduit from the dam and other works. While the allegation of injury to the banks made in the bill of complaint herein suggests the second meaning, it is otherwise sufficiently clear as by the allegation as to defendant's taking water from the ditch, that the right alleged by plaintiff and admitted to belong to him, refers to the first meaning of the word "ditch"; that is, a right of way or easement for conducting water across land.

It must be carefully noted that while in the second defense defendant pleads an enlargement of the ditch by plaintiff during 1906, this enlargement is not pleaded as a reason for relief. If the ditch was enlarged by plaintiff in 1906 conceivably defendant

might have contended that the easement thereby became a greater burden to the serviant tenement, and for that reason might have gone into court praying the forfeiture of plaintiff's ditch right or a mandatory injunction requiring the plaintiff to restore the ditch to its former size. [32] This was not done by plaintiff and the claimed enlargement is not here pleaded for any such reason. Defendant's position, in fact, requires that the ditch be maintained and continued. The only reason, therefore, for raising the issue on the enlargement of the ditch is that it was the means by which defendant claimed the water was taken out of Little Butte Creek, by reason of which diversion defendant claims the right of recapture. I know of no authority or no principle of law upon which this claim of recapture can be based. If in 1906 plaintiff diverted water which should have been allowed to flow down Little Butte Creek to defendant's dam, defendant's remedy was either an action for damages or an injunction requiring plaintiff to permit the water to flow in Little Butte Creek to defendant's dam as theretofore. The water itself did not become the subject of property, until restrained by plaintiff's diverting works and ditch. When it passed into plaintiff's ditch it became plaintiff's private property to which defendant had no right without making compensation. It is difficult to see in what way the commission of a tort by plaintiff would justify defendant in committing a tort against plaintiff by trespassing upon its right of way and taking the water it had impounded. There seems no good reason why if plaintiff prevented the

water reaching defendant's ditch, defendant gained thereby a right to have the water delivered on his land by the plaintiff's ditch without charge and without any burden of maintenance and operation of the ditch to himself. The case of *Silver Creek vs. Hayes*, above cited, is an authority against defendant's position.

In view of the defendant's claim that the case is not in point it is proper to examine it carefully.

The complaint there alleged ownership and possession by [33] plaintiff of a certain ditch, that defendant entered thereon wrongfully, and "without right, taking water therefrom and injuring the banks thereof, and threatened to continue," etc. There was an answer and a cross-complaint. There was a demurrer to the cross-complaint which was overruled. Judgment was given for the plaintiff on his complaint and for the defendant on his cross-complaint. There was an appeal by the plaintiff from the judgment on the cross-complaint, and from an order refusing plaintiff a new trial thereon. The point was made that the demurrer to the cross-complaint should have been sustained because it did not state a cause of action at all, and, second, that it did not state facts sufficient to constitute a cause of action for a cross-complaint. The Supreme Court held that both points were well taken. The first was well taken because there was no sufficient allegation in the cross-complaint that the defendant's lands were riparian to the stream, and therefore, and for other reasons, the cross-complaint showed no right to the waters of the creek in question. Judge Temple then continued:

“If the cross-complaint can be held to state a cause of action which might be the basis of an independent suit, it does not state a cause of action which is the proper subject of cross-complaint in this case.

“The relief sought in the cross-complaint does not defeat, overcome, or affect plaintiff’s rights of action or lessen or modify the relief to which plaintiffs are entitled. If this proposition can be tested by the result, it is fully shown by the fact that plaintiffs and defendant were each awarded the relief they sought.

“Nor does the cause of action set up arise out of the transaction set out in the complaint, nor is it connected with the subject of the action. The transaction is the alleged trespass of the defendant, and, if the phrase ‘subject of the action’ refers to the rights involved, only the claim of plaintiffs to their ditch was involved. No right to water is asserted nor was it necessary for plaintiffs in order to make a case to show any.

* * * * *

“The cause of action set up by plaintiffs and [34] the rights asserted by defendant has no reference to each other. True, there was no water in the ditch, and the evidence shows that it came from Panoche creek. But the fact that defendant had a superior right to the water flowing in the creek would not justify him in disturbing the ditch, or in taking what water he needed from the ditch at points where it passed over or near his land.”

The Court accordingly struck out the judgment on the cross-complaint. While it is true, as stated by defendant's counsel, that the case was rested on two grounds, the Court emphasized the second ground and rested its decision largely upon the reasoning there set forth. This reasoning appeals to me in this case and shows that if the facts stated could not have been the subject of a cross-complaint, they could not have constituted matter of defense for the reason last stated by Judge Temple.

So far as the second defense is concerned, therefore, there is no issue here as to defendant's right in the waters of Little Butte Creek, nor any issue as to enlargement of the ditch, or any proper foundation for a claim for damages. Neither do the facts alleged afford defendant any justification for diverting plaintiff's water from its ditch unless this justification can be claimed on some other ground, as, for example, that suggested by the third defense. It may be, as stated in my ruling to strike out, that the facts alleged can be considered in regard to the defense of laches, or as presenting a case of inequity on the part of the plaintiff.

The third defense in effect is, that defendant is justified in taking water from plaintiff's ditch provided such use is not "inconsistent with the enjoyment of said easement possessed by plaintiff." Defendant's position is that plaintiff must prove in definite measure the amount of water which it has an easement to conduct over defendant's land. Defendant's position must be that if there is in the ditch any water over and above this amount defend-

ant may take it out without compensation. [35] If such a rule prevailed ditch owners would be constantly harassed by servant owners taking water from their ditches under claim of right, and putting them upon proof of the quantity which they were entitled to conduct. Since the amount of water passing through a ditch differs as between seasons, and even between hours of the same day, the practical injustice of such a doctrine seems obvious. In fairness to defendant, however, it must be stated that its position in this case does not go thus far. Its position is that where it has the right to divert water from a stream and this right has been destroyed by the action of the upper ditch owner it may use the upper ditch jointly for the passage of its water with the water of the upper owner, on the theory that such owner will get only the water to which he was rightfully entitled. Authority for this proposition is sought in the case of Hoyt vs. Hart, 149 Cal. 722. A careful examination of that case is desirable. The facts show that plaintiff and defendant were adjoining land owners with a common north and south line, plaintiff's land lying to the west. On the easterly side of defendant's land was an irrigating ditch. This ditch served plaintiff's land by means of a lateral ditch extending across the defendant's farm. This lateral was used both for the purpose of irrigating defendant's farm, and for conveying water beyond it to plaintiff's premises. Interference with this lateral ditch was alleged. The complaint alleged that plaintiff was the owner of 200 inches of the water flowing in the main ditch which was stated

to have a capacity of 800 inches. The answer alleged that the main ditch would carry only 600 inches; that plaintiff was not entitled to 200 inches, or any definite or fixed amount in inches, but only a proportion of the water which might be flowing in it, alleged to be one-eighth, the other seven-eighths being claimed by the defendant. The Court found that the [36] main ditch had a capacity of 600 inches; and that plaintiff owned an undivided one-eighth of the waters in it; that plaintiff had an easement over defendant's premises for her one-eighth, which easement in the lateral ditch was held by her in common with the defendant. It is to be noted that the ditch which was in question was the defendant's land and wholly on that land, and that it was found that both parties had a right in that ditch easement, and in the water which flowed through it. The question before the Supreme Court was whether the decree was supported by the findings, it being claimed that it went beyond that. The Court said, p. 727:

"It is claimed that the decree, in authorizing the defendant to use the ditches running over his land in common with the plaintiff, deprives the plaintiff of the fixed and definite easement claimed by her" (and found to exist in her).

The Court then said that she was awarded her full rights and the defendant's joint use would not interfere with her.

"There is no inconsistency between the portion of the decree declaring that plaintiff has an easement in these ditches and that portion which grants to defendant the right to use the ditches

jointly with plaintiff for the purpose of carrying his waters. The easement is a right to use the lands of the defendant for conducting her waters to her lands. It can coexist with a right in the defendant (and this right was here established),” or anyone else to use the same waterways, so long as such use does not restrict or interfere with the right owned by the plaintiff.

* * * In the case at bar there is no allegation that the plaintiff’s right was exclusive. The Court found, and the evidence fully supported the finding, that for forty years the defendant and his grantors had used the ditches as a portion of the irrigating system of the Hart lands. This finding, which was within the issues, necessarily called for the adjudication that Hart might continue to use these ditches, provided that he so used them as not to interfere with the plaintiff’s right.”

The Court in effect held that the findings supported the judgment. Both declared a joint right in the ditch over defendant’s [37] land, plaintiff’s being the superior right.

I have omitted from the above quotation from the decision that portion most relied on by defendant in the case at bar, and advisedly have omitted it to show clearly that the decision was sufficient and perfectly clear without the omitted portion. The portion omitted is shown in my quotation by an indicated break. It reads:

“It would not be claimed that merely because A has a right of way over B’s land, B cannot

under any circumstances use that portion of his land affected by the easement in a manner which does not infringe upon the exercise of such easement. It is well settled, as a general proposition, that the owner of the serviant estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement. 'Thus in a case of a water way the owner of the serviant estate may use the land over which it passes in any manner which does not materially impair or unreasonably interfere with its use as a way. He may himself use it as a way unless the rights of the owner of the easement are exclusive.' (14 Cyc. 1208 and cases cited)."

Judge Sloss in writing the opinion, and the Supreme Court in adopting it, did not intend, and certainly did not need to be understood as saying that defendant here had no joint right in the easement, he could nevertheless use it jointly with plaintiff without bearing any of the expense.

And, furthermore, if the case cited is to be considered as authority for the proposition that defendant may use plaintiff's land ditch for the passage of defendant's water, provided room enough is left for the passage of plaintiff's water, it must necessarily be limited in its operation to that portion of the ditch on defendant's land. Here, however, the defendant claims the right to run the water which it claims not only through the plaintiff's ditch in defendant's land, but through the upper portion of plaintiff's ditch between the intake and defendant's

land, which runs over land not owned by defendant at all. [38]

The cases of *Smith vs. Hampshire*, 4 Cal. App. 8, and *Bashore vs. Mooney*, *ibid.* 276, decided only that the Bader Mining Company, for example, could as a matter of law acquire a prescriptive right in the ditch here against the plaintiff. In the latter case the Court said: "That defendants could acquire a prescriptive right to use the ditch to convey a limited quantity of water to their lands, while plaintiff or his predecessors retained the right also to use the ditch for his own purposes to the extent of its remaining capacity, we have no doubt."

None of the cases cited, therefore, seem to justify defendant in its claim of right to divert this water through plaintiff's ditch and to take it out as it passes its land. Nor do they imply the corollary proposition that the owner of a right of way for water must in a suit to prevent trespass upon it prove his right to the water itself, or must measure the extent of his right of way in inches as against a trespasser. I conclude, therefore, that the issues tendered by the third defense are without validity in law, and certainly are insufficient upon the facts shown. It further appears, as contended by plaintiff's counsel and apparently admitted by defendant's counsel (Tr. 12), that the ownership of water is not here in question.

By reason of the above considerations the question whether or not defendant in fact enlarged this ditch in 1906 becomes immaterial.

There are, therefore, left for determination the

question of the statute of limitations, the question of plaintiff's laches, the question of whether plaintiff's conduct has been so inequitable as to debar it from relief at the hands of this court, and chiefly, the question whether defendant has made out a prescriptive title to use a portion of the Nickerson [39] ditch to conduct through it water to the extent of its necessities at its mine and to divert this water at its spillway.

I have already stated that a better understanding of the issues and of the law governing this case might have limited the volume of testimony which actually was submitted. For the determination of the issues which still remain for decision, however, it has become necessary in my consideration of this case to read all the testimony carefully, and to arrange it in condensed form in chronological order. This statement of the facts of this case which now follows may involve consideration and determination of facts not necessary to a decision, and heretofore stated to be not involved. A connected story, however, must necessarily, for the sake of clearness, tell the whole story as it was presented by the evidence. I do not, for example, in this report, intend to find either as to plaintiff's title to the water in the Nickerson Ditch or as to defendant's title by reason of this appropriation in 1899. If I am wrong in my conclusions as to the necessary *presents* of these issues the case will have to be referred again for findings. [40]

THE FACTS SHOWN BY THE EVIDENCE.

There are three ditches with which the facts of

this case are concerned; first, the ditch variously known as the Walker and West ditch, the West ditch, the Powers Ditch and the Thompson Flat Ditch; second, the Nickerson Ditch, formerly the Delaplain Ditch; and third, the Snow Ditch. The first ditch referred to is generally designated by the witnesses the Powers Ditch and will be so referred to in this report. The Snow ditch took its waters from a branch of the Feather River and emptied them into Little Butte Creek above the intakes of the other two ditches referred to. The Nickerson, and before that the Delaplain ditch, took its water out of Little Butte Creek above the intake of the Powers Ditch. The Powers head-dam was also located upon and the ditch was served by Little Butte Creek. Both the Nickerson and the Powers ditch proceeded across the land of the defendant long prior to the date when the defendant took title thereto. All three ditches were originally built in early days; many years before the events with which this case is concerned.

The record title to the Powers ditch and to the Nickerson and the Snow Ditches is, in outline, as follows:

POWERS DITCH.

January 31, 1876, West to Powers and others.

June 23, 1883, commissioner's deed to Jenkin Morgan.

June 11, 1887, Morgan to A. F. Jones, 1-8.

July 12, 1887, Morgan to A. F. Jones, 1-32.

September 15, 1887, Morgan to A. F. Jones, 1-10.

September 2, 1890, Morgan to A. F. Jones, 26, 100.

May 20, 1898, Morgan to A. F. Jones, 147-800.

May 20, 1898, Morgan to A. F. Jones, 3-10.

October 9, 1897, A. F. Jones and Thermalito Colony Company to Walter Cutting.

May 25, 1898, Jones and wife to Oroville Water Company. [41]

August 15, 1905, Oroville Water Company to Oro Water, Light & Power Company.

May 12, 1912, Oro Water, Light & Power Company to Oro Electric Corporation.

NICKERSON AND SNOW DITCHES.

March 14, 1888, Delaplain to Nickerson.

June 29, 1888, Slocum to Nickerson.

July 15, 1890, Nickerson to Frank McLaughlin.

October 4, 1897, McLaughlin and wife to Thermalito Colony Company by A. F. Jones, president, to Walter Cutting.

April 30, 1898, Walter Cutting and others to Oroville Water Company.

August 15, 1905, Oroville Water Company to Oro Water, Light & Power Company.

March 12, 1912, Oro Water, Light & Power Company to Oro Electric Corporation.

It does not clearly appear how Cutting's interest in the Powers Ditch returned to Jones or became vested in the Oroville Water Company. The Thermalito Colony Company, which appears as joint grantor with McLaughlin and of Jones in the respective deeds to Cutting, was an agricultural colony near Oroville in which Jones and McLaughlin were both apparently interested, at and prior to 1897, and thus made use of the waters of the ditches in question.

During the period of its user the Powers Ditch had the first right to the waters in Little Butte Creek. In the 70's Powers carried the water down to a point opposite Oroville for hydraulic mining purposes and also supplied the town of Thompson Flat near Oroville; apparently the town of Oroville also with water for domestic uses (Tr. 629). This use of the water for mining purposes continued until some point in the late 80's when hydraulic mining was stopped, and thereafter the water was used by the Thermalito Colony until the transfer of the ditch to the Oroville Water Co. in 1898 (Tr. 650). During all this period, and up to about 1888 or [42] 1890 the Powers ditch in summer took all the water flowing in Little Butte Creek except the water which was brought from the Feather River by the Snow Ditch (Tr. 628, 429). As early as 1881 the Delaplain ditch, which afterwards became the Nickerson Ditch, was not in use and was out of condition (Tr. 35). Below the Bader Gold Mining Company's property on Little Butte Creek there is and was at this time situated a mine known as the Mineral Slide Mine. In the period between 1883 and 1888 Nickerson was one of the owners of the Mineral Slide Mine and in 1888 he became sole owner (Tr. 89). During this period the Mineral Slide Mine used the water which was brought into Little Butte Creek by the Snow Ditch, and this water was measured past the Powers head-dam so as to flow down Little Butte Creek to the Mineral Slide Ditch. In 1888 having, as appears by the testimony of the witness North (Tr. 630), more water than he needed at all times

for the uses of the Mineral Slide Mine, Nickerson formed and carried out the idea of acquiring the Delaplain Ditch and using through it the water brought in by the Snow Ditch. The purpose was to use such water as might be necessary at his Mineral Slide Mine and carry the rest down to a farming region some few miles below known in this record as Paradise. Nickerson's plan included the bonding of farming land and the subdivision and sale of it with water privileges from the Nickerson Ditch. The Nickerson Ditch itself was built in 1888 following the line of the old Delaplain Ditch. For a time apparently the water still flowed past the Nickerson head-dam or was otherwise allowed to pass so as to run through the Powers Ditch (Tr. 630, 51). The witness North says that in the year 1889 "there were no ranchers buying the Nickerson Ditch water to amount to anything;" and we may infer that Nickerson's plan was not successful. It has been seen that Nickerson conveyed the Snow and Nickerson Ditches [43] to Frank McLaughlin in July, 1890, Mr. A. F. Jones, who in July, 1890, owned a little over a quarter in the Powers Ditch, and in September owned over one-half of it, seems from the evidence to have been associated in this water enterprise and in the Thermalito Colony with McLaughlin. He was McLaughlin's agent or attorney (Tr. 108). At about this time, probably by reason of some such business association, the evidence shows that all the water in Little Butte Creek in summer time was taken through the Nickerson Ditch and transferred through a ravine at some point below the defend-

ant's land into the Powers Ditch. Just before Nickerson's transfer to McLaughlin was made McLaughlin was prepared to reconstruct the Powers flumes and had lumber there for that purpose (Tr. 817). The Nickerson Ditch, however, had fewer flumes and was easier to maintain; and this led to the arrangement stated by which all the water was first diverted to the Nickerson Ditch and later transferred to the Powers Ditch. The upper portion of the Powers Ditch, being no longer in use, about 1890 fell out of repair (Tr. 803, 817). The Snow Ditch also went out of use at about the same time, 1890. This is the testimony of the witness Moody (Tr. 39). The uses of the combined Nickerson-Powers Ditch at that time and for many years afterwards were for mining purposes during winter when there was a considerable head of water for hydraulicking, and other mining purposes, and for irrigation purposes during summer. It is abundantly clear on the evidence despite much contradictory testimony, that after 1890, when the Powers Ditch went out of repair, the Nickerson Ditch took all of the water in summer flowing in Little Butte Creek at the Nickerson dam. It may be inferred, however, from all the evidence, that the Snow Ditch was allowed to go out of use, at any rate so far as the Little Butte water-shed was concerned, for the reason that at [44] least in these early days there was in that creek and water-shed sufficient water for all purposes for which the Nickerson-Powers Ditch was then used.

George P. Mowry began mining on what is now the Bader Gold Mining Company mining claim in

August, 1892. He used for his purposes water that he procured from the Nickerson Ditch. His mining was only done in the winter season when the water was not sufficient for irrigation. In summer it was all used by the farmers. It would appear that his earlier uses of the water from the Nickerson Ditch involved no payment to the owners of the ditch. At some time between 1892 and 1895 the witness Moody, who was interested with Mr. McLaughlin, at that time in the Mineral Slide Mine, was also put in general charge of the Nickerson Ditch for either one or two winters during that period and was asked to look out for it during the winter while the ditch-tender was away (Tr. 70). While he was in charge he allowed Mr. Mowry to take water without payment (Tr. 63). Mowry continued to use water from the Nickerson Ditch in winter up to 1899 at least, the water in summer going on to the farmers below. There is some evidence in the record that for a portion of the time between 1893 and 1896 or 1900 Mowry paid for the water (Tr. 524), but it is not necessary to determine that fact. Mr. Mowry testified that during this period he had Major Jones' permission for the use of the water.

In March, 1899, Mowry posted a notice of appropriation of 500 inches of water at the old Powers head-dam then out of repair, in Little Butte Creek, and thereafter constructed a new dam and ditch following the old Powers structure to bring water to his mine. In 1900 there was a slide that carried Mowry's ditch out. Mowry's testimony as to the impelling cause of this appropriation of water is

difficult to square with all the facts. From 1897 to 1899 he was using the water in winter time by permission of Mr. McLaughlin, the owner. He [45] testifies at page 108 of the transcript that McLaughlin stated that he would give him the ditch but that it did not belong to him but to Cutting, stating, however, at the same time "we have no location but all our water comes through Snow Ditch. You locate the Thompson Flat Ditch and the water." The record shows that McLaughlin and the Thermalito Colony transferred the Nickerson Ditch to Cutting in October, 1897, and at the same time Jones and the Thermalito Colony transferred the Powers Ditch. It is difficult to believe that McLaughlin would slander his title after the conveyance, but at any rate if such were the fact I would take no account of it as evidence in the case of well established principles. The witness Hendricks, who built the dam and ditch for Mowry in 1899, states a version much more consonant with what appears to be the facts. He says that Mowry told him he was going to build his dam to get some winter water and thus save buying water (Tr. 462). For at least nine years all the water in Little Butte had passed down the Nickerson Ditch in summer time and for the same period of time the Snow Ditch water had not come into Little Butte, The use of the water during summer by irrigators further down the line of the ditch had become established and it is unlikely that Mr. Mowry intended to get any other water than winter water, as Mr. Hendricks states (see also, Bader, Tr. 432, Hen. 548-9).

In 1900 the defendant, the Bader Gold Mining Company, was organized. It does not appear in the evidence that Mowry's rights, if any, under the appropriation, were transferred to it. There is some evidence however that the water was used through the Mowry ditch at times thereafter, which would constitute an actual appropriation to the extent of the user. It is not entirely clear to what extent the Mowry ditch was used. Mr. Mowry claims that it was used each year until 1906. It has [46] been seen that it was destroyed by a slide in 1900. There is some evidence that it was repaired in 1905 and used till 1906 only (Tr. 179, 101), and that it was again repaired in 1911 (Tr. 556). During the years from 1900 to 1904 the defendant's mining operations consisted of ground sluicing during the winter time during the period of high water only. For this purpose it was necessary to have the quantity and the head of water that the Nickerson Ditch afforded. Water from the Nickerson Ditch was in fact so used and if any water was used through the Mowry Ditch, the old upper Powers Ditch, I am of the opinion that this amount was negligible. It is clear at any rate that during the summer time no water ran in it during this period except such water as was made by springs or other seepage below the Nickerson head-dam. Mr. Mowry testifies that in 1900 when his ditch went out in December, he made an arrangement with one Smith who was then president of the Oroville Water Company whereby he rented the Nickerson Ditch from him at a rental of \$50 a month, with the obli-

gation of keeping the ditch in repair during the winter. This arrangement, Mr. Mowry says, was oral, and Mr. Smith is dead. The only significance of this testimony as to the arrangement would be that it would imply what otherwise seems doubtful, that the appropriation of Mowry was thus kept alive. On the other hand, Mr. Fogg, who was interested in the Oroville Water Company at the time, states that the company passed a resolution allowing Mowry to use the water in the Nickerson Ditch for hydraulic purposes during the winter season (when it was not needed for irrigation) and at a flat rate of \$50 a month, keeping the ditch in repair. This certainly would be the more natural agreement for the water company to make since it would meet the ends of both parties. Furthermore, it is clearly in evidence that from 1902 to the winter of 1904-1905, the company regularly sent its bills to the defendant "for water furnished" and on its regular bill form and that the defendant [47] through Mr. Mowry paid these bills in due course. There is in evidence a letter to the Oroville Water Company from Mr. Mowry. "Exhibit 5," dated January, 1903, in which he incloses payment of "water bills." If it had been in fact a ditch rental and not a bill for water service, it would be natural that the transaction should be stated in that form by either or both parties. In 1903, the monthly payment was increased to \$75. In this period, 1900, to 1904, when hydraulicking was being done, water was only used during the winter time (Tr. 536). During the year 1905, and it would appear during the succeeding winter, the

defendant's operations consisted of tunneling, not requiring the purchase of water. Since then their mining operations have consisted of what is called drift mining; that is to say, running tunnels to an ancient channel and bringing gravel out to be washed.

It has been seen that on August 15th, 1905, the Oroville Water Company transferred its properties to the Oro Water, Light & Power Company. This transfer marks a new phrase in the history of these ditches. At all times prior thereto with which we are concerned, their usual uses were for irrigation during the summer and such mining as there was during the winter. The amount of mining had gradually decreased. To the extent of its needs defendant could rely on getting water from the Nickerson Ditch during the winter at a rate which would seem not to be prohibitive. Since there was no use of the water during the winter season when it was most plentiful except for mining purposes and since there was not any great call for water for that purpose, the company would naturally sell it at a very low rate. The added element of use for power which organization of the Oro Water, Light & Power Company in 1905 brought into the field made a radical change in the situation, a change which I think explains the controversy between the parties here. The plan of the new company was to collect [48] the waters of this and its other ditches in a reservoir known as the Kunkle Reservoir and to use this water for electric power purposes during the winter, with continued service of the established irrigation user during the summer. Accordingly, a survey for

new work was made in 1905 and in 1906 Nickerson Ditch was cleaned out in its upper portion, including the part here in controversy, and its lower portion was reconstructed and diverted into the Kunkle Reservoir. Whether the lower portion extending to the reservoir followed the line of the old Powers Ditch is not here material. Whether the cleaning out which took place near, through and above the Bader Company's ground was an enlargement or merely a cleaning out is, as hitherto explained, likewise immaterial in this controversy. I have no doubt from all the evidence that since 1906, the ditch's capacity of winter flow was slightly greater than the original Nickerson ditch. The purpose of any cleaning of the ditch would be, of course, to increase its capacity, and it may be that the cleaning was here made very thorough and may have added something to the original flow in winter. It is to be noted, however, that there is no proof of any enlargement of either the dam or head-gate. It is unimportant for our purposes however what took place, since even before that time the Nickerson Ditch had since 1890 taken all the summer flow which is here in controversy.

There is no evidence in the record as to any negotiations between the defendant and the owners of the ditch after 1906 for further supply during the winter for mining purposes. It may be inferred, however, that the defendant or Mr. Mowry, its manager, appreciated that it would be more difficult to get water either by permissive use or for a moderate flat rate than theretofore. It would be natural, therefore,

that the defendant should fall back on whatever rights it may have [49] secured by Mowry's appropriation in 1899.

Mr. Mowry claims for the defendant that ever since 1906 he has taken water out of Nickerson Ditch as his own as he desired it, openly, continuously and with the knowledge of the defendant, and has never paid for it. He testifies to conversations with Mr. Goodwin, the president of the Oro Water, Light & Power Company, in 1906, in one of which he protested against the claimed enlargement of the ditch through the defendant's property, and in the other notified Mr. Goodwin of his claim to the water and stated that he would use the Nickerson Ditch to carry it to his company's ground. Mr. Goodwin denies the conversations and they must therefore be considered not proved. Mr. Durbrow was the manager of the Oroville Water Company and of its successor corporation between 1903 and 1908. He was frequently over the ditch during that time. From his testimony it appears that the last bill rendered to the Bader Company was in April, 1906, and that all water used by the defendant to the knowledge of the company's officials was billed. He testifies that if any water was used by the defendant between 1906 and 1908 it was without his knowledge or the knowledge of the company; that if it was taken during the summer time when all the water was needed for irrigation he would have learned of its diversion either from the ditch-tender or from the complaints of irrigators. Considering the fact that in the succeeding years this adverse user was many times brought

home to the officers and servants of the company Mr. Durbrow's testimony seems credible, and I cannot find otherwise than that such user of water as was made in these years was without the company's knowledge. That it was used at times seems established by the evidence. Such use as was made, however, was occasional and was not made openly and in such a manner as to raise a foundation for prescription. If it had been taken in winter when there was a full ditch head it would not have been discovered [50] by the company except as it might come to the attention of some ditch-tender walking by. In summer it could only have been used without discovery if taken for a brief period of perhaps twenty minutes at a time, a custom which the evidence shows was pursued by the defendant later on. In other words, I find that such use of water as was made during this period was surreptitious. In 1909, however, and in the year following defendant's use was openly adverse and known to the plaintiff. The ditch-tender Beik, who was in charge beginning in 1909, first learned that the defendant was taking water in April. He found the gate open and one Bishop in charge, an employee of Mr. Mowry, superintendent of the defendant company. Bishop stated that Mowry had ordered him to turn the water on fifteen or twenty minutes at a time and then turn it back for half an hour so that it would catch up and the water company would not miss it. The defendant's needs at this time were regulated by the fact that its mining was drift mining. This required a sluice head of about 50 inches of water each day

to wash out the accumulated gravel, an operation that would require about an hour or an hour and a half. A similar diversion of water to the knowledge of Mr. Beik and Mr. Davis, plaintiff's superintendent, occurred on May 3, 1909. On both these occasions the gate was closed by Bishop after protest from the company's representatives. Lincoln, the ditch-tender, testified that between April, 1909, and November, 1910, he was constantly on the ditch and detected no use of water by the defendant until November, 1910. Thereafter it was used upon a number of different days which he reported to Mr. Davis for the purpose of rendering bills for the use of the water; in 1911 he found the gate open in October and closed it; it remained shut until the 27th, when he found it open and closed it again. During all this time when the gate [51] was open it diverted only about half of the ditch flow. At least 70 or 75 inches would flow down even if the Bader spillway was open. But on August 19, 1912, the defendant put in a cross-gate in the ditch below its spillway and since that time all the water in summer time had passed through the Bader property and had been diverted from the irrigators down below. There is a good deal of testimony in the record showing that between 1909 and 1912 the gate of the Bader spillway was found open by the company's representatives and was closed by them, and at numerous times during this period notices were posted both by the company and in one instance by Mowry, forbidding interference with the ditch or the waters. I do not deem it necessary to go into this evidence in detail. It is

sufficient to say that there has not been an open use by defendant for the prescriptive period prior to the beginning of this suit. The adverse and open use commenced only in 1909. Furthermore, it is apparent from the evidence that even on Mr. Mowry's own statement, as well as by the evidence otherwise, the defendant's use of the ditch and of the water through its spillway was several times interrupted by the plaintiff's employees. During all this period from 1888 to the present time the plaintiff and its predecessors in interest have been in the actual possession of the ditch and in the control and management of it. Furthermore, it is clear from the evidence that all taxes since 1888 assessed against the Nickerson Ditch have been paid by the plaintiff or its predecessors and that no taxes on said ditch have been paid by the defendant.

It is apparent upon the facts that defendant's claim to a prescriptive right to a portion of the ditch or the right to take water therefrom fails upon the evidence presented.

For the same reasons it is apparent from the foregoing findings of fact that the Statute of Limitations has not [52] run against plaintiff.

Neither is there seen any foundation for the defense of laches. Generally speaking, a court of equity in determining a defense of laches will be governed by the Statute of Limitations applicable in actions at law. There are, of course, exceptional circumstances where a shorter period will be enforced. Equity between the parties sometimes requires the plaintiff to act quickly. This is especially

the case where plaintiff's delay in seeking the jurisdiction of equity changes the position of the parties. Nothing of that sort appears here. I have found that since about 1890 when the upper Powers Ditch was permitted to fall into decay all the water flowing down Little Butte Creek during the summer season of each year was taken into the Nickerson Ditch. The Mowry Ditch during the summer-time appears on the evidence to have been fed only by reservoired water proceeding from springs and other sources of supply below the Nickerson dam with perhaps some inevitable leakage from that dam. In 1906 and thereafter the defendant was in the same position as regards summer water as it had been since 1890. Its position was not changed by any act of the plaintiff or by any failure of plaintiff to apply for relief in a court of equity. Defendant's use was not known to plaintiff until 1909, and thereafter until August, 1912, it was only occasionally discovered. Plaintiff appears to have submitted to these annoyances during this period until the diversion of the entire supply by the building of a cross-gate in August, 1912, occasioned the filing of the bill. I see nothing in the situation which called upon plaintiff to act promptly so long as the bill was filed within the period fixed by the Statute of Limitations. The defense of laches cannot, therefore, be sustained.

In view of the facts found, and for the reasons last stated, there is nothing apparent to me why the plaintiff [53] has not come before this court with clean hands. I have assumed what may not be a valid assumption that if defendant could show that plain-

tiff in 1906 had diverted defendant's water from its ditch so that it inevitably fell out of repair and caused defendant loss, there might possibly be a reason why an injunction should not be refused at this time. It is apparent that the evidence does not establish any such facts.

I have not deemed it necessary to rest this case in any respect upon the fact that plaintiff is a public service corporation. It is plaintiff's position that even if defendant's contentions are sustained its only remedy was an action for damages for the diversion. *Crescent Canal Co. vs. Montgomery*, 143 Cal. 252; *Barton vs. Riverside Water Co.*, 155 Cal. 513; *Gurnsey vs. Northern California Power Co.*, 160 Cal. 710.

It is also contended that where both the ditch and the water were, as here shown, dedicated to public use no prescriptive right could be acquired in either so long as such use continued. *Southern Pac. Co. vs. Hyatt*, 132 Cal. 240; *Leavitt vs. Lassen Irrigation Co.*, 157 Cal. 82. I have not deemed it necessary to consider these questions.

Plaintiff claims damages in the sum of \$3,000. While it is apparent that it has suffered loss, and that defendant from time to time diverted water from the ditch for a period of years and since August, 1912, has diverted with occasional exceptions, all the water from the ditch, I am not able upon the evidence to determine either the amount of water diverted or its value, or the plaintiff's consequent damages.

From the foregoing I conclude:

That plaintiff should have the decree of this court that the said claims of the defendant, Bader Gold Mining Company, are invalid and without right; that said defendant has no estate, right, title or interest in or to said Nickerson Ditch and no right to take water therefrom; except upon compensation made; that plaintiff is the owner [54] of said ditch, and that said defendant be forever restrained and enjoined from asserting any claim thereto or any estate therein, and from entry upon, or in any way interfering with said ditch, or taking water therefrom; that plaintiff have from defendant its costs to be taxed.

The parties may have ten days from the date of the announcement of this report in draft within which to serve and file with the Master objections thereto; and, furthermore, if either party considers the findings of fact incomplete or in form insufficient for its protection, either party may likewise serve and file specific findings in numbered paragraphs conformable to the views of the Master set forth in the foregoing report.

Dated December 8, 1914. [55]

Supplemental Report of Master.

On December 8, 1914, in accordance with the usual practice in the Master's office, I notified counsel for the respective parties that the Master's report was in draft, that on or before December 19, 1914, the parties might serve and file with the Master copies of their objections hereto, and, furthermore, either party was given leave to file specific findings in numbered paragraphs if the Master's findings of fact

were deemed insufficient in form or substance. A copy of said letter of notification is annexed hereto.

On Dec. 19, 1914, the defendant filed objections to the Master's report which are herewith separately returned. No objections were filed by plaintiff.

I have carefully reviewed defendant's objections in the light of the draft report and of the evidence. I make the following comments:

In objection II, page 2, defendant objects to the statement of the Master at pages 8 and 20, foregoing; that defendant's counsel had admitted that the question of title to the water flowing in the Nickerson Ditch, or otherwise, involved, was not here in question. While I think my statement is borne out by the transcript, it may be said that the opinion expressed by the report in regard to the matter in issue, would have been the same regardless of counsel's admission.

In objection XII, page 8, defendant objects "to the inclusion in said draft report of the Master of the narrative of facts extending from page 22 to the first paragraph on page 31, inclusive." The report is couched in the usual form of an opinion. It is true that, as stated on page 21 of the report, it may be that some facts have been found by the Master which may be considered [56] immaterial to the issues, although such was not my intention. What the defendant calls a narrative of facts was intended by the Master to be the findings of fact in issue which the order of reference requires me to report, and to obviate any doubt upon the matter I find the facts as stated in the foregoing report. Either party was

given leave to file specific findings in numbered paragraphs if that form was desired.

In objections XI, page 8, the defendant objects to the Master's failure to find that defendant's property is riparian to Little Butte Creek at a point below the dam and intake of said Nickerson Ditch. A re-examination of the pleadings fails to show that the riparian rights of defendant were made an issue in this case whatsoever.

Objection XXIV, page 15, is founded upon a misreading of the draft report. The report uses the language "foundation for prescription," not "foundation for trespass."

All defendant's objections are overruled and the foregoing draft report as supplemented by this supplemental report is settled, signed, filed with the Clerk as my final report herein, and the parties notified thereof by mail this 22d day of December, 1914.

H. M. WRIGHT,
Standing Master in Chancery.

[Endorsed]: Filed Dec. 22, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,620.—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corporation,
Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corporation,
Defendant.

Objections and Exceptions to Draft Report of Standing Master in Chancery on Final Hearing.

To the Honorable H. M. WRIGHT, Standing Master
in Chancery:

Bader Gold Mining Company, defendant herein,
makes the following objections and exceptions to the
Master's draft report on final hearing:

I.

Defendant objects and excepts to the ruling made
by the Master on the first day of the trial denying
the defendant's motion to dismiss the proceedings
and requiring defendant to go forward with the
presentation of its case, which said ruling is referred
to in said draft report at pages 7 and 8.

Defendant objects and excepts to said ruling on the
following grounds:

- (a) That said ruling was erroneous in that it was
based upon the conclusion of the Master that
the plaintiff had made a *prima facie* case,

whereas the material allegations of the complaint had been put in issue by the answer and not admitted on the hearing.

- (b) That said ruling was erroneous in that the Master held that it was not necessary for the plaintiff to define or measure the easement right for the flowage of water claimed to exist over defendant's land. [58]
- (c) That said ruling was prejudicial to the presentation of defendant's case on the hearing, and that said prejudice was not cured by any subsequent liberality of the Master permitting additional testimony.

II.

Defendant objects and excepts to the statement and language of the Master contained on pages 8 and 20 of said draft report as follows: "It was also admitted by the defendant that the question of title to the water was not in question in this case at all."

Defendant objects and excepts to said statement on the following grounds:

- (a) That the statement of counsel referred to, as shown by the record at the page indicated in said draft report, was made in answer to a question of the Master as to whether the cross-complaint sought to quiet title to the water, and did not purport to be a statement to the effect that the question of the title to the water was not involved in any aspect of the case.
- (b) That it was admitted by counsel for the plaintiff that the question of water was involved

by virtue of the allegation in the complaint that the defendant "had taken large quantities of water therefrom" (Tr. 12).

- (c) That the Master himself considered the question of the title to the water involved if defendant's theory of defense was valid in law, as is shown by the statement of said Master on page 13 of said draft report.
- (d) That during the trial a great deal of evidence was taken bearing solely on the question of the rights to the water in Little Butte Creek and in the Nickerson Ditch on the part of both the plaintiff and the defendant, and said rights were discussed in the written briefs filed and in the oral argument and was only held to be immaterial by the Master on his conclusion that the second and third affirmative defenses of the defendant were not valid in law.
- (e) That in view of the foregoing facts it is apparent that counsel's statement had no reference other than to the direct question asked by the Master and that it is unfair to construe such statement as an admission that no question concerning the title to the water was involved in any aspect of the case or to use said statement, since its inference and suggestion is that counsel's admission was inconsistent with the defendant's theory set forth in the second and third affirmative defenses.

[59]

III.

Defendant objects and excepts to the statement and

language of the Master found on page 8 of said draft report to the effect that his ruling denying the defendant's motion to dismiss the said proceedings and requiring the defendant to proceed with the proof of its case was based in part on the admissions made by the parties at the hearing.

Defendant objects and excepts to said statement and language on the following grounds:

- (a) That prior to the making of said ruling counsel for defendant withdrew any admissions made except those contained in the pleadings (Tr. 30).
- (b) That the Master did not purport to make said ruling on anything except the admissions contained in the pleadings (Tr. 29, 30, 31, 32 and 689).

IV.

Defendant objects and excepts to the statement of the Master found on page 11 of said draft report to the effect that there is no issue apparent on the ownership and possession by plaintiff and its predecessors at all relevant times of the Nickerson Ditch.

Defendant objects and excepts to said statement on the following grounds:

- (a) That the traverse of the allegations contained in the complaint is not modified by the use of the words "except as hereinafter alleged" used in said answer and that said words do not incorporate allegations elsewhere in said answer.
- (b) That said facts were not admitted at the hearing or if admitted in the preliminary discus-

sion by counsel said admissions were withdrawn before the ruling of the Master on the motion to dismiss and the taking of testimony.

V.

Defendant objects and excepts to the statement of the Master found on page 11 of said draft report to the effect that there is no issue on the allegation that defendant interfered with the [60] easement thus possessed by plaintiff both by diverting the water and by obstructing the ditch.

Defendant objects and excepts to said statement on the following grounds:

- (a) That the denial of these allegations by the answer were not qualified by the words "except as hereinafter alleged" used in the answer.
- (b) That defendant at no place in its answer admitted any interference with the easement right possessed by the plaintiff either by diverting water or obstructing the ditch.
- (c) That interference with the easement right possessed by the plaintiff either by diverting the water or by obstructing the ditch were at no time during said hearing admitted by the defendant, but on the contrary the defendant contended consistently throughout said hearing that it *had no* time interfered with the easement right possessed by the plaintiff.

VI.

Defendant objects and excepts to the ruling and conclusion of law of the Master found on pages 12 to 16, inclusive, of said draft report to the effect that

the allegations contained in the first three paragraphs of the second defense pleaded by defendant did not constitute a defense to said action, and that if, as a matter of fact, the plaintiff, or its predecessors in interest, had diverted from Little Butte Creek at a point above the lands of the defendant, water to the use of which the defendant as lower riparian owner or as appropriator was entitled, and thereafter was conducting and transporting said water in an open ditch across the lands of said defendant, that said defendant was not thereby entitled to take from the ditch at a point on its land where the same was crossing, the water to the use of which it would have been entitled had the same been permitted to flow on its usual course down Little Butte Creek.

Defendant objects and excepts to said ruling and conclusion of law on the following grounds: [61]

- (a) That said conclusion is contrary to and inconsistent with the principles announced in the cases of Hoyt vs. Hart, 149 Cal. 722, Smith vs. Hampshire, 4 Cal. App. 8, and Bashore vs. Mooney, 4 Cal. App. 276.
- (b) That the case of Silver Creek vs. Hayes, 113 Cal. 142 is not an authority against defendant's position as set forth in said second defense, or if an authority against defendant's position is inconsistent with and has been overruled by the principles enunciated in the cases cited *supra*.
- (c) That defendant's position does not require that the Nickerson Ditch be maintained and continued as set forth by said Master on page 14

of said draft report in discussing said second defense, but on the contrary goes to the extent only of contending that while water to the use of which the defendant would be entitled is actually being diverted and carried over the land of the defendant that he is entitled to take and use the same where it finds it on its land.

- (d) That it is not true, as a matter of law, as stated on page 14 of said draft report, that when the water passed into plaintiff's ditch it became the plaintiff's private property to which defendant had no right; that said statement is only true if the plaintiff had the right to carry and transport said water across the lands of the defendant. In this connection the attention of the Master is called to the recent ruling of the Supreme Court of the State of California in the case of *Copeland vs. Fairview Land Company*, 165 Cal. 148, to the effect that water, though severed from its natural water course and confined in a ditch, is not personal property but is real property, and to the necessary legal deduction from said principle that when the water transported by plaintiff reached the lands of the defendant and was passing thereover, that it became the property of the defendant as the owner of the fee which he was entitled to take and use on his land, unless precluded by some existing right in the plaintiff to carry and transport the same across said land. Atten-

tion is also called to the pertinency of this principle to defendant's claim that the easement right of the plaintiff must be definitely measured and to the materiality of the question as to whether or not the plaintiff in 1906 diverted from Little Butte Creek into the Nickerson Ditch water to the use of which the defendant was entitled and the question as to the respective rights of the plaintiff and defendant in and to the waters in Little Butte Creek and the Nickerson Ditch.

- (e) That the question of the maintenance and operation of the ditch across defendant's land is not a material question, as suggested by the Master on page 14 of said draft report, since it is independent of the fundamental right involved and not connected therewith. [62]

VII.

Defendant objects and excepts to the ruling and conclusion of the Master found on pages 16 to 20, inclusive, of said draft report to the effect that the allegations contained in the third defense set out in the answer of the defendant do not constitute a defense in law and that if, as a matter of fact, the plaintiff, or its predecessors in interest, diverted water from Little Butte Creek into the Nickerson Ditch to the use of which defendant as lower riparian owner or as appropriator was entitled and thereafter conducted and transported said water through said Nickerson Ditch over the lands of the defendant that said defendant would not be entitled to take from said ditch at a point on its land, for use on said land,

the water to the use of which it would have been entitled had said water been permitted to flow down Little Butte Creek, provided that the taking of said water at a point on its land and the use of said ditch for the transportation thereof to said point was not inconsistent or in interference with the easement possessed by the plaintiff across the land of the defendant.

Defendant objects and excepts to said ruling and conclusion of law of the Master on the several grounds heretofore stated upon which defendant objects and excepts to the ruling and conclusions of law on the second defense of defendant which said grounds are enumerated in objection numbered VI herein and on the further ground,

- (f) That the authority of the case of Hoyt vs. Hart is not, as stated by the Master, necessarily limited in its operation to that portion of the ditch on defendant's land.
- (g) That the statement of the Master found on page 17 of said draft report to the effect that if the rule contended for by defendant prevailed ditch owners would be constantly harassed by servient owners taking water from their ditches under claim of right and putting them upon proof of the quantity which they are entitled to conduct, is of no materiality since [63] the same reasoning is equally applicable to cases of controversies between riparian owners, between riparian owners and appropriators, and between appropriators of the waters of a stream, and

overlooks the obvious answer that as soon as a right is infringed an action lies to quiet title and admeasure the right and to secure a declaratory injunction.

VIII.

That defendant objects and excepts to said draft report on the ground that the Master has failed therein to find, upon the evidence adduced whether the Nickerson Ditch was enlarged by the plaintiff, or its predecessors in interest, in or about the year 1906 from the intake of said ditch on Little Butte Creek to the spillway on defendant's land to such an extent as to substantially increase the capacity of said ditch and has failed to find the amount of such increase, if in fact increased, expressed in statutory miner's inches.

IX.

Defendant objects and excepts to said draft report on the ground that the Master has failed, on the evidence adduced, to find on the fact whether the plaintiff, or its predecessors in interest, in 1906, or thereabouts, diverted, and has ever since been diverting the water flowing in Little Butte Creek, or any portion of the water flowing in Little Butte Creek, whether in summer or winter, to the use of which the defendant was, either as riparian owner or as appropriator, entitled.

X.

Defendant objects and excepts to said draft report on the ground that the Master has failed, upon the evidence adduced, to find on the respective rights of the plaintiff and defendant in and to the waters flow-

ing in Little Butte Creek, or in the Nickerson Ditch.

XI.

Defendant objects and excepts to said draft report on the ground that the Master has failed, upon the evidence adduced, to find and state that the property of the defendant over which the [64] Nickerson Ditch extends is riparian to Little Butte Creek at a point below the dam and intake of said Nickerson Ditch.

XII.

Defendant objects and excepts to the inclusion in said draft report of the Master, of the narrative of facts extending from page 22 to the first paragraph on page 31, inclusive, of said report.

Defendant objects and excepts to the inclusion of said narrative of facts in said report or in the final report of the Master on the following grounds:

- (a) That the facts recited on said pages of said draft report are relevant and pertinent only to the question of the respective rights of plaintiff and defendant in and to the waters of Little Butte Creek and the Nickerson Ditch, to the question whether the Nickerson Ditch was enlarged in 1906, and to the question whether all or any of the water flowing in Little Butte Creek to the use of which defendant was entitled was diverted in that year into said ditch, all of which questions the Master in his report holds immaterial and states that he does not intend to find upon.
- (b) That none of said facts recited in said narrative have any pertinency to nor are necessary

for the understanding of the question of the application of the Statute of Limitations, the question of plaintiff's laches, the question of whether plaintiff's conduct has been so inequitable as to disbar it from relief, or the question whether it has made out a prescriptive title to the use of a portion of the Nickerson Ditch, which said questions are the only questions deemed pertinent or material by the Master and all of which said questions concern solely facts arising after the year 1906.

- (c) That so far as said narrative states as facts, matters concerning which there is a conflict of testimony or inference from testimony the same may prove highly prejudicial to the defendant herein in the event that the respective rights of the plaintiff and defendant in and to the water flowing in Little Butte Creek or the Nickerson Ditch, not deemed material by the Master in this controversy, should hereafter become involved in litigation.
- (d) That the Master should either find on the ultimate facts to which alone the probative facts recited in said narrative are relevant or eliminate said narrative.

XIII.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the statement of the Master found [65] on page 23 of said draft report to the effect that the Oro Water, Light

& Power Company transferred and conveyed to the Oro Electric Corporation, the plaintiff herein, on May 12th, 1912, the ditch referred to in said report as the Powers Ditch.

Defendant objects and excepts to this statement of the Master on the ground that said Powers Ditch is not included by any description contained in said deed.

XIV.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the statement found on page 23 of said draft report as follows: "Thereafter the water was used by the Thermalito Colony until the transfer of the ditch to the Oroville Water Company in 1898."

Defendant objects and excepts to said statement on the following grounds:

- (a) That there is no evidence in the record whatever in support of said statement and no evidence therefore can be found at the page of the record indicated; that the only witnesses who testified at all to the use of the old Powers Ditch prior to the reconstruction of the upper end thereof by Mr. Mowry in 1899 were the witnesses Milton J. Green, Trans. 648, 653, and A. W. Fogg, Trans. 676 to 691, and neither of said witnesses stated or suggested that the Thermalito Colony used said ditch as late as 1898.
- (b) That said statement is misleading in that the Master does not distinguish between that portion of the Powers Ditch extending from the

Mineral Slide hill to the lower end thereof, and that portion extending from the Mineral Slide hill to the head thereof on Little Butte Creek, which said latter portion was concededly abandoned after 1890 and so stated by the Master on page 25 and elsewhere of his said draft report.

XV.

Without prejudice to the objection numbered XII herein defendant objects and excepts to the statement and language of the Court found on page 23 of said draft report as follows: "The Thermalito Colony Company which appears as joint grantor with McLaughlin [66] and of Jones in the respective deeds to Cutting was an agricultural colony near Oroville in which Jones and McLaughlin were both apparently interested at and prior to 1897 and thus made use of the water and ditches in question," and also to the statement and language of similar import beginning with the words "It has" on the next to the last line on page 24, up to and including the words "Powers Ditch" at about the middle of page 25.

Defendant objects and excepts to said statements on the following grounds:

- (a) That said statements are uncertain and indefinite and the Master, without specifically finding thereon or purporting to find thereon, suggests the existence of some arrangement between Jones and McLaughlin when they were respectively interested in the Powers and Nickerson Ditches for the joint use of said ditches, whereas there is no direct evi-

dence in the record as to any such arrangement, and no evidence from which any such arrangement can be legitimately inferred.

- (b) That said statement and language is indefinite and uncertain and the Master, without finding specifically thereon or purporting to find thereon, suggests and intimates that the respective water rights attaching to the Powers and Nickerson Ditches were in some manner consolidated and merged, whereas there is no direct evidence in the record of any such merger and no evidence from which such fact can be legitimately inferred.
- (c) That there is no competent evidence adduced at the hearing that shows or even tends to show any arrangements between Jones and McLaughlin for the joint uses of the Powers and Nickerson Ditches, or any arrangement for the merger of the respective water rights attaching to said ditches.
- (d) That there is no competent evidence in the record that shows or tends to show as stated by the Master that just before Nickerson's transfer to McLaughlin was made McLaughlin was prepared to reconstruct the Powers flume and had lumber there for that purpose, so far as said statement intimates and suggests that McLaughlin had any right in or to the Powers Ditch.
- (e) That there is no evidence in the record that shows or tends to show that any arrangement was made between Jones and McLaughlin

whereby the water was first diverted to the Nickerson Ditch and later to the Powers Ditch for the reason that the Nickerson Ditch had fewer flumes and was easier to maintain, or for any other reason. [67]

- (g) That said statements and conclusions are so indefinite and uncertain that conclusions can be inferred therefrom not intended by the Master prejudicial to defendant's rights.

XVI.

Without prejudice to the objection numbered XII herein defendant objects and excepts to the statement and language of the Master found on pages 25, 27, 28 and 30 of said draft report to the effect that after 1890 the Nickerson Ditch took all the water in the summer time flowing in Little Butte Creek.

Defendant objects and excepts to said statement and language on the following grounds:

- (a) That said statement and language is misleading in that it does not appear nor does the Court find whether said taking was the basis of any adverse claim of the plaintiff against the rights of the defendant or whether said taking was under claim of right and adverse to the rights of the defendant.
- (b) That said statement and language is misleading in that no statement is made as to whether or not after the water was taken into the Nickerson Ditch a definite quantity thereof was thereafter returned to Little Butte Creek (see testimony of witness Bickford as to cus-

tom of returning water to creek after taken into ditch, Tr. 797 to 824, 839).

- (c) That said statement and language wholly ignores the testimony of the witness G. B. North that the water was flowing in Little Butte Creek from October, 1891, to August, 1892, while he was at the Mineral Slide Mine (Tr. 87), the testimony of the witness L. Cohn to the effect that from 1901 to 1904 there was from 150 to 300 inches in Little Butte Creek at Mineral Slide Ditch in summer time (Tr. 153, 158, 160, 164), the testimony of the witness A. A. McCubbin to the effect that on May 1st, 1904, he saw water running from Little Butte Creek into the Powers Ditch (Tr. 143); the testimony of the witness A. M. Glover to the effect that for a period of eight months through the spring and summer and fall of 1905, 75 to 100 inches were running in Little Butte Creek (Tr. 772, 773, 775), and the testimony of the witness W. C. Bader to the effect that he had seen as much as 75 inches of water in the summer time in Little Butte Creek (Tr. 751, 758, 759, 761), and the Master does not state or find that these witnesses are unworthy of belief or entitled to less credence than the employees of plaintiff, the only witnesses to the contrary.
- (d) That said statement is indefinite, uncertain and misleading in that the Master does not define or state what period of the year is intended to be covered by the words "summer time,"

or whether any of the water flowing in Little Butte Creek other than in the "summer time" was taken after 1890. [68]

XVII.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the statement and language of the Master found on pages 26 and 27 of said draft report, that after 1892 all the water in the Nickerson Ditch was used by the farmers below the intake of said ditch in the summer.

Defendant objects and excepts to said statement and language on the following grounds:

- (a) That there is no evidence in the record showing or tending to show what use, if any, or the extent of the use of the water in the Nickerson Ditch in the summer time between the year 1890 or 1891, at which time the witness North, as recited by the Master, testified that Nickerson abandoned his enterprise and the year 1903 the first date in the books of the Oroville Water Company produced by the plaintiff during the hearing.

XVIII.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the statement and language of the Master found on pages 26 and 27 of said draft report to the effect that the witness Mowry's testimony as to the impelling cause of his appropriation of water in 1899 is difficult to square with the facts and that the explanation of the witness Hendrix states a version much more consonant with what appears to be the facts.

Defendant objects and excepts to the statements and language of the Master on the following grounds:

- (a) That the Master does not find as a fact that McLaughlin did not make the statements testified to by the witness Mowry.
- (b) That the Master does not state the principle upon which he declines to consider the statement of McLaughlin with reference to the title to the Nickerson Ditch.
- (c) That as heretofore indicated there is no evidence in the record to the effect that for at least nine years, or at all, all the water in Little Butte Creek had passed down the Nickerson Ditch in the summer time and for the same period the Snow Ditch water had not come into Little Butte Creek, or that the witness Mowry had [69] theretofore been buying water and therefore no basis for the purported statement of Mowry that he was building the dam to get winter water and save buying the same.

XIX.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the statement and language of the Master found on pages 27 and 28 of said draft report to the effect that it is not entirely clear to what extent the Mowry ditch was used prior to the year 1906, and that this use was negligible and to the failure of the Master to find that said ditch was used each year from 1901 to 1906 to a substantial extent.

Defendant objects and excepts to said statement and language of the Master on the following grounds:

- (a) That said statement wholly ignores the testimony of C. M. Hendrix, a witness called by the plaintiff, who testified that while he was employed at the defendant's mine from 1901 to 1904, water was being taken from both the Mowry and Nickerson Ditches to at least the extent of 1,000 inches from both (Tr. 555, 563, 564, 573), and that the amount taken through that ditch was 400 inches (Tr. 563, 564).

XX.

Without prejudice to the exception numbered XII herein defendant objects and excepts to the statement and language of the Master found on pages 28 and 29 of said draft report to the effect that the defendant through Mr. Mowry made arrangements for the purchase of water from the predecessor in interest of the plaintiff, and did not, as testified to by Mr. Mowry, make arrangements only for the use of the Nickerson Ditch.

Defendant objects and excepts to said statement and language on the following grounds:

- (a) That there is no competent evidence in the record to support said statement and in this connection defendant points out that the testimony of the witness A. W. Fogg is not entitled to any weight for the reason that he testified as to the resolution of the Board of Directors of the Oroville Water Company, which resolution was not [70] produced

nor an adequate excuse for its non-production shown and for the further reason that the witness testified that he was unable to state whether the arrangement to which he testified referred to the Miocene Ditch or to the Nickerson Ditch (Tr. 679). That the testimony of the witness James W. Goodwin is of little weight since said witness testified that he personally in the latter part of 1901 or the early part of 1902 made the arrangement with Mowry (Tr. 741, 742), whereas all the evidence shows that the arrangements made were in the year 1900; that the entries in the books of the Oroville Water Company were not competent since they were self-serving declarations.

XXI.

Without prejudice to the objection numbered XII herein defendant objects and excepts to the statement and language of the Master found on pages 30 and 31 of said draft report to the effect that the reason that no further negotiations were had by the defendant and the owners of the ditch after 1906 was due to the belief of Mowry that it would be more difficult to get water by permissive use or for a moderate flat rate than theretofore and that it was natural that he fall back upon his rights of appropriation.

XXII.

Defendant objects and excepts to the finding contained on page 31 of said draft report to the effect that Mr. Mowry's statement that he protested against the claimed enlargement of the ditch through the de-

fendant's property and notified it of its claim to the water and stated that he would use the ditch to carry it, must be considered not proved because denied by Mr. Goodwin.

XXIII.

Defendant objects and excepts to the statement and finding of the Master found on page 31 of said draft report that the last bill rendered to the Bader Company was in April, 1906.

Defendant objects and excepts to said statement and finding on the following grounds:

- (a) That said statement is misleading since it fails to state whether the bill rendered at said time was for water used at that period or prior thereto. [71]
- (b) That said statement and finding is based on the testimony of Mr. Durbrow testified to at his first examination without the books of the Oroville Water Company (Tr. 277), which said statement was subsequently corrected by witness when he testified from the books (Tr. 657) from which books it appeared that the last payment for water by the defendant was made in September, 1905, and that this payment was a delinquent payment for water used in the winter of 1904.

XXIV.

Defendant objects and excepts to the finding and statement of the Master found on pages 31 and 32 of said draft report that the defendant company in the period from 1906 to 1909 used the water from the Nickerson Ditch only occasionally and not in such

a manner as to raise a foundation for trespass.

Defendant objects and excepts to said statement and finding on the following grounds:

- (a) That as a matter of law if any water was used during said period it was a sufficient foundation for an action for trespass.
- (b) That said finding and statement wholly ignores the testimony of the witnesses C. W. Bader, Trans. 437, 438, and of W. C. Bader, Trans. 750, 751, to the effect that water was used continuously from the Nickerson Ditch by the defendant company after 1906 and the Master does not find that the testimony of these witnesses is unworthy of belief.
- (c) That said statement and finding wholly ignores the evidence shown by the original time sheets of the defendant company beginning in 1905 wherein it appears that the mine was operating practically continuously since said date which, in connection with the fact that no other water was available except out of the Nickerson Ditch was conclusive evidence of the truth of the testimony of C. W. Bader, C. E. Bader and Mr. Mowry that water had been taken continuously after 1906. (Defendant's Exhibits "F," "G" and "H.")

XXV.

Defendant objects and excepts to the statement and finding of the Master found on pages 31 and 32 of said draft report that the water that was taken by the defendant company from the Nickerson Ditch in the years intervening between 1906 and 1909 was

taken without the company's knowledge and surreptitiously and that there was no open use of the ditch until after 1909. [72]

Defendant objects and excepts to said finding and statement of the Master on the following grounds:

- (a) That said finding is uncertain and indefinite in that it does not appear whether the Master means that no employee of the company had knowledge of the user during said years or whether as a matter of law the knowledge of said employees who had knowledge was not the knowledge of the company. In this connection the attention of the Master is called to the testimony of the witness Bickford to the effect that in the years in which he was ditch foreman, 1907 to 1909, that he knew that the defendant company was taking and using water from the Nickerson Ditch (Tr. 798 800, 821, 822).
- (b) That if said statement and finding is a statement to the effect that no employee of said company was actually aware of the taking of water from the Nickerson Ditch, said finding wholly ignores the testimony of W. C. Bader to the effect that during said years the ditch was used openly from morning till night (Tr. 750, 751), which said testimony, if found to be true by the Master, would import knowledge as a matter of law; that it ignores the testimony of the witness Bickford heretofore referred to and the testimony of A. A. Davis, a witness produced by the plaintiff

(Tr. 610) to the effect that he was informed while superintendent of the company by the superintendent, Mr. Bickford, that the defendant company had in the year 1908 taken water from the Nickerson Ditch, which said testimony was also in corroboration of the testimony of Mr. Bickford.

XXVI.

Defendant objects and excepts to the statement and finding of the Master found on page 32 of said draft report to the effect that it was a custom for the defendant to use the water from the Nickerson Ditch for a brief period of perhaps twenty minutes at a time for the purpose of precluding discovery of said usage.

Defendant objects and excepts to this statement and finding on the following grounds:

- (a) That the only evidence in the record shows one occasion upon which the witnesses Biek and Lincoln testified that one Bishop stated he was turning the water on and off for a brief period of twenty minutes under the direction of Mr. Mowry and there is no evidence whatsoever to show that this was done on any other occasion or that there was any custom to this effect. [73]
- (b) That said statement and finding wholly ignores the testimony of the witness W. C. Bader to the effect that while he was employed by the company he turned the water on in the morning, permitted it to run all day, and turned it off again at night (Tr. 750, 751), which testi-

mony the Master does not state is unworthy of belief.

- (c) That said statement ignores the explanation of witness Mowry as to the circumstances under which Bishop was given the instructions which was credible (Trans. 783).

XXVII.

Defendant objects and excepts to the statement and finding of the Master found on page 32 of said draft report that Bishop stated to the witness Biek that Mowry had ordered him to turn the water on fifteen or twenty minutes at a time and then turn it back for half an hour so that it would catch up and the water company would not miss it.

Defendant objects and excepts to said statement and finding on the following grounds:

- (a) That the evidence upon which said statement and finding is based was not legally admissible and was duly objected and excepted to at the trial (Tr. 324-327).

XXVIII.

Defendant objects and excepts to the statement and finding of the Master found on page 32 of said draft report to the effect that on both occasions on which the witness Biek found Bishop at the gate said Bishop closed the gate after protest from the company's representatives.

Defendant objects and excepts to said statement and finding on the following grounds:

- (a) That said statement is unfair and misleading since the Master does not find that the gate was closed by said Bishop as a result of the

protest of the company's representatives or in recognition of any right claimed by the company in and to the use of the Nickerson Ditch, there being no evidence for any such finding (Tr. 345, 346).

- (b) That if said statement and finding purports to find that the said gate was closed by said Bishop as a result of the protest of the company's representatives that said fact is immaterial and not binding upon the defendant company for the reason that it does not appear that said Bishop was an agent of the defendant company for the purpose of admitting or recognizing any [74] claimed rights on the part of the company.
- (c) That if said statement, so far as the same refers to the second occasion upon which said gate was closed by Bishop, and so far as it purports to find that the gate on that occasion was closed as a result of the protest of the company's representative, is directly contrary to the evidence in that it appears that he closed the gate because he was through with the water according to plaintiff's own witnesses (330, 347).

XXIX.

Defendant objects and excepts to the statement and finding found on page 33 of said draft report that a cross-gate was placed in the Nickerson Ditch on August 19th, 1912, below its spillway, and that since that time all the water in summer time has

passed through the Bader property and diverted from the irrigators.

Defendant objects and excepts to said statement and finding on the following grounds:

- (a) That if said statement infers that no cross-gate was put in the Nickerson Ditch below defendant's spillway prior to August 19th, 1912, it is misleading and contrary to the evidence since it appears without contradiction that prior to said time there were posts in the ditch into which a gate could be placed which was and could readily be used as a cross-gate. (S. B. Moody, Trans. 42, 43; H. H. Lincoln, Trans. 406; C. M. Hendrix, Trans. 581, A. A. Davis, Trans. 626, 627; W. C. Bader, 753), and which was used during the period 1901-1904 when defendant was concededly diverting all water in Nickerson Ditch while ground sluicing.

XXX.

Defendant objects and excepts to the conclusion of law stated on page 33 of said draft report that defendant's use of the ditch and of the water through its spillway was several times interrupted by the plaintiff's employees.

Defendant objects and excepts to said conclusion on the following grounds:

- (a) That it does not appear from the record that on any one occasion on which an employee of the defendant closed the gate of defendant's spillway, the fact that such employee of the company had closed the gate was called to the attention of the defendant company.

XXXI.

Defendant objects and excepts to the failure of the Master [75] to find upon the evidence adduced specific acts constituting the alleged interruptions referred to on page 33 of said draft report.

Defendant objects and excepts to the failure of the Master to find such specific acts on the following grounds:

- (a) That the finding that the defendant's use of the ditch and the water through its spillway was several times interrupted is but a conclusion of law upon facts which are not set forth in said Master's report.
- (b) That unless said specific acts constituting said interruptions referred to on page 33 of said draft report, are found and stated by the Master the defendant is in no position without a review of the whole record of raising the question as to whether the acts constituted legal interruptions.
- (c) That it does not appear from the report of the Master whether the acts of the employees of the plaintiff which in his opinion constituted interruption consisted only in the closing of the defendant's spillway or in acts of a different character, or whether the action of Bishop in closing the gate alone is relied upon as showing such interruption.
- (d) That the Master does not find if he considers the acts of the plaintiff's employees in closing the spillway the basis for said legal interruption, whether said acts at the time they

were done were brought to the attention of the defendant company as the acts of plaintiff company under a claim of right to do so.

XXXII.

Defendant objects and excepts to the Master's conclusion of law, and finding that plaintiff's action is not barred by the statute of limitations.

XXXIII.

Defendant objects and excepts to the Master's conclusion of law that the defense of laches raised by the defendant is not sustained by the evidence.

Defendant objects and excepts to this conclusion on the following grounds:

- (a) That the Master fails to find whether or not in 1906 the plaintiff's predecessor diverted into the Nickerson Ditch from Little Butte Creek water to the [76] use of which defendant was entitled, which said fact, if true, would constitute an element bearing upon the defense of laches.
- (b) That the Master fails to find upon the fact whether or not the ditch and flume used by the defendant prior to 1906 as a result of the diversion of the water of Little Butte Creek into the Nickerson Ditch fell into decay. In this connection the attention of the Master is called to the fact that while he finds that the defendant's position with reference to summer water was the same subsequent to 1906 that it had been prior thereto, he does not find or determine whether or not any diversion was made of the usual or cus-

tomary flow in the winter time such as would lead to a forced nonuser of defendant's ditch and a resultant decay thereof.

- (c) That the finding of the Master that defendant's use of the ditch after 1909 and until August, 1912, was only occasionally discovered so far as said finding purports to find that the water was only used openly occasionally is not supported by the evidence.

XXXIV.

Defendant objects and excepts to the conclusion of the Master that the plaintiff has not come into court with unclean hands and is not in such an inequitable position as to preclude the granting of an injunction.

Defendant objects and excepts to this conclusion on the ground and for the reason that it objected and excepted to the Master's conclusion that the remedy of the plaintiff was not barred by laches set out in objection numbered XXXIII *supra*.

XXXV.

Defendant objects and excepts to the ruling of the Master excluding the offered testimony of B. L. McCoy as to the nature and character of the work that was done under his supervision on the Nickerson Ditch in 1906 to which ruling an exception was duly taken at the time of the hearing (Tr. 824 to 825).

XXXVI.

Defendant objects and excepts to the ruling of the Master excluding the offered testimony of the witness William J. Newman [77] to the effect that on every occasion upon which he has visited the defend-

ant's mining property, which has been frequently since the year 1906, he has seen the defendant company using the water from the Nickerson Ditch openly, which ruling was duly excepted to at the time of the hearing (Tr. 828, 829).

Defendant objects and excepts to said ruling on the ground that said ruling was prejudicial in that the Master has found that between the years 1906 and 1909 the user by the defendant of the Nickerson Ditch was not open but surreptitious. [78]

XXXVII.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the statement and language of the Master found on page 26 of said draft report to the effect that there is some evidence in the record that for a portion of the time between 1893 and 1896 or 1900 Mowry paid for the water.

Defendant objects and excepts to said statement and language on the ground that the only evidence in the record that could by any possibility be construed as showing such payment for water prior to 1900, is the testimony of W. H. Hendrix, at the page indicated, to the effect that at one time between 1893 and 1900 one Wagstaff had asked him to be at the Mowry gate in the morning and had said that Mowry was getting more water than he was paying for; that said testimony is wholly incompetent and hearsay, and was volunteered on cross-examination by the witness, and was not competent testimony upon which to base any statement or any finding that Mowry was buying water prior to 1900.

XXXVIII.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the statement and language of the Master found on page 26 of said draft report to the effect that the mining done by Mr. Mowry after 1892 was done in the winter season when the water was not sufficient for irrigation.

Defendant objects and excepts to said statement and language of the Master on the ground that there is no evidence in the record whatsoever that Mowry's use of the water in the years immediately succeeding 1892 was confined to winter water.

XXXIX.

Without prejudice to the objection numbered XII herein, defendant objects and excepts to the language of the Master found on [79] pages 25 and 27 of said draft report that the Snow Ditch went out of use about the year 1890, at any rate so far as the Little Butte water shed was concerned.

Defendant objects and excepts to said statement and language of the Master on the following grounds:

- (a) That the testimony of the witness S. B. Moody went only to the extent of stating that when he saw the ditch in 1890 it was out of repair, and did not purport to state whether it was thereafter put in repair or used.
- (b) That the said Master wholly ignores the entry in the books of the Oroville Water Company, produced in evidence, as follows: "Snow Ditch expense during 1901, Dr. \$1694.84,"

(663) which said entry was not explained by the plaintiff; that there is no basis for the suggestion and inference in the Master's statement that said item referred to a part of the Snow Ditch not on the Little Butte water shed, since there is no evidence in the record whatsoever to show that the plaintiff company, or its predecessors in interest, had any use for the Snow Ditch on any other water shed.

XL.

Defendant objects and excepts to the finding and language of the Master on page 33 of said draft report to the effect that, according to Mr. Mowry's own statements, the defendant's use of the ditch was several times interrupted.

Defendant objects and excepts to said finding and language of the Master on the ground that the witness Mowry at no place in his testimony stated or admitted that the plaintiff company, or its predecessors in interest, at any time interrupted defendant's use of the water from the Nickerson Ditch; that he testified solely to the fact that on several occasions he found his spillway gate closed, but that he did not know who closed it, and that neither the plaintiff company, nor its predecessors in interest, ever notified him that they had closed it.

XLI.

Defendant objects and excepts to the statement and conclusion [80] of law of the Master found on page 33 of said draft report to the effect that it is apparent, on the facts, that defendant's claim for

a prescriptive right to the use of a portion of the ditch, or the right to take water therefrom, falls upon the evidence presented.

Defendant objects and excepts to said statement and conclusion on the ground that the evidence shows the contrary.

XLII.

Defendant objects and excepts to the finding and statement of the Master on page 34 of said draft report to the effect that the Mowry Ditch during the summer time appears to have been fed only by reserved water proceeding from springs and other sources of supply below the Nickerson dam, with perhaps some inevitable leakage from that dam.

Defendant objects and excepts to said finding and statement on the ground, as heretofore stated, that the same is not sustained by the evidence.

XLIII.

Defendant objects and excepts to the failure of the Master, on the evidence adduced, to find whether the plaintiff's title to the Nickerson Ditch arose in grant or by prescription, and to his failure to find that if it arose by prescription, the extent of the user of the easement while the prescriptive title was ripening.

XLIV.

Defendant objects and excepts to the failure of the Master to find, upon the evidence adduced, the usual and customary daily amount of water, expressed in statutory miner's inches, taken and diverted by the defendant from the Nickerson Ditch during the period beginning in 1906 and ending at

the time of the commencement of this action, when such water was needed and used by said defendant.

[81]

XLV.

Defendant objects and excepts to the holding and ruling of the Master that it was not and is not necessary that the plaintiff should measure and define its easement right across the lands of the defendant in terms of the amount of, or by the particular description of the water which it is entitled to flow across said lands, and to the failure of the Master, upon the evidence adduced, to find the exact extent and character of the easement right across defendant's land owned by the plaintiff.

XLVI.

Defendant objects and excepts to the conclusion of the Master that the claims of the defendant are invalid and without right; that said defendant has no estate, right, title or interest in or to said Nickerson Ditch, and no right to take water therefrom except on compensation made; that the plaintiff is the owner of said ditch and that defendant be forever restrained and enjoined from asserting any claim thereon or any estate therein, and from entry upon or in any way interfering with said ditch or taking water therefrom, and that plaintiff have from defendant its costs to be taxed.

Defendant objects and excepts to said general conclusion of the Master on all the grounds herein set forth.

WHEREFORE, defendant prays that the Master's draft report may be so amended and corrected

as to remove the grounds of the aforesaid objections and exceptions.

R. H. CROSS,

Attorney for Defendant.

Receipt of a copy of the within is hereby admitted this 19th day of December, 1914.

GOODFELLOW, EELLS, MOORE &
ORRICK,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 19, 1914. H. M. Wright, Master. Filed Dec. 22, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [82]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corporation,

Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corporation,

Defendant.

Stipulation That Defendant's Objections and Exceptions to Draft Report of Master in Chancery may Stand as Exceptions to Final Report of Master.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that the defendant's objections and exceptions to the draft report of the Standing Master in Chancery on final

hearing in the above-entitled action heretofore served and filed and returned by said Master with his final report to the above-entitled court, may stand as and for the exceptions to the said final report of said Master as filed in said court.

It is further stipulated and agreed that Exception No. XXIV as found on page 15 of said defendant's objections and exceptions may, in view of the statement of the Master in his supplemental report, that his said draft report had been misread, be changed to read as follows:

XXIV.

“Defendant objects and excepts to the finding and statement of the Master found on pages 31 and 32 of said draft report that the defendant company in the period from 1906 to 1909 used the water from the Nickerson Ditch only occasionally and not in such a manner as to raise a foundation for prescription.

Defendant objects and excepts to said statement and finding on the following grounds:

- (a) That said finding and statement wholly ignores the testimony of the witnesses C. W. Bader, Trans. 437, 438, and of W. C. Bader, Trans. 750, 751, to the effect that water was used continuously from the Nickerson Ditch by the defendant company after 1906 and the Master does not find that the testimony of these witnesses is unworthy of belief. [83]
- (b) That said statement and finding wholly ignores the evidence shown by the original time sheets of the defendant company beginning

in 1905 wherein it appears that the mine was operating practically continuously since said date which, in connection with the fact that no other water was available except out of the Nickerson Ditch was conclusive evidence of the truth of the testimony of C. W. Bader, C. E. Bader and Mr. Mowry that water had been taken continuously after 1906. (Defendant's Exhibits 'F,' 'G,' and 'H.')

Dated January 5th, 1915.

GOODFELLOW, EELLS, MOORE &
ORRICK,

Attorneys for Plaintiff.

R. H. CROSS,

Attorney for Defendant.

[Endorsed]: Filed Jan. 9, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [84]

At a stated term, to wit, the March term, A. D. 1915,
of the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the City and County of San Francisco,
on Monday, the 17th day of May, in the year of
our Lord one thousand nine hundred and fif-
teen. Present: The Honorable WILLIAM C.
VAN FLEET, District Judge.

No. 15,620.

ORO ELECTRIC CORPORATION,

vs.

BADER GOLD MINING CO.

(Order Overruling Exceptions to Master's Report.)

Defendant's exceptions to the Master's report, heretofore heard and submitted being now fully considered and the Court having rendered its oral opinion thereon, it was ordered that the said exceptions severally and all of them be overruled and denied, that the Master's report stand confirmed and that a decree be signed, filed and entered in accordance with said report. [85]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corporation,

Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corporation,

Defendant.

Final Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows:

That plaintiff is the owner of that certain water ditch situate in the county of Butte, State of California, and known as the "Nickerson Ditch," ex-

tending in a general southerly and southwesterly direction from its intake at Little Butte Creek, in the northeast quarter of section thirty-six (36), township twenty-three (23) north, range three (3) east, Mount Diablo Base and Meridian, through sections one (1), two (2), eleven (11), twelve (12) and thirteen (13), in township twenty-two (22) north, range three (3) east, and sections eighteen (18), nineteen (19) and thirty (30) in township twenty-two (22) north, range four (4) east, Mount Diablo Base and Meridian, to the Kunkel Reservoir in section thirty-one (31), township twenty-two (22) north, range four (4) east, Mount Diablo Base and Meridian;

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that defendant has no right, title or interest in or to said ditch, or any part thereof, nor has defendant any right to enter or encroach upon said ditch, or any part thereof, or interfere therewith, or disturb plaintiff's possession thereof; nor has defendant any right (excepting upon obtaining plaintiff's permission and paying the lawful rates therefor) to divert or take any of the water which now is, or may hereafter [86] be, in said ditch.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that a perpetual injunction issue herein forever restraining and enjoining said defendant, its officers, agents, workmen and employees, and all persons acting in aid of, or in conjunction with, them, or any of them, and all persons claiming by, through or under said defendant,

from asserting any right, title, interest or claim in or to said ditch, or any part thereof, or from entering or encroaching upon, or in any way interfering with, said ditch, or any part thereof, or any flume, gate or spillway therein or forming a part thereof, or used by plaintiff in connection therewith, or from opening or operating, or from preventing plaintiff, its servants, agents, workmen or employees, from closing (either permanently or temporarily), the spillway or gate situate in the west side of said ditch in the northwest quarter of section one (1), township twenty-two (22) north, range three (3) east, Mount Diablo Base and Meridian, known as the "Spillway for Bader Mine," or any spillway, gate or other contrivance in said ditch for regulating or manipulating the flow of water therein or therefrom, or (excepting upon obtaining plaintiff's permission and paying the lawful rates therefor) from diverting or taking, or causing to be diverted or taken, any of the water which now is, or may hereafter be, in said ditch.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff recover its costs herein, taxed at the sum of fourteen hundred seventy-five and 85/100 (\$1475.85) dollars.

Done in open court this 24th day of May. A. D. 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed and entered May 25, 1915.
Walter B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk. [87]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corpora-
tion,

Defendant.

Summary of Evidence.

The above-entitled cause having, by stipulation of the parties, been referred to the Honorable H. M. Wright, Standing Master in Chancery, at the District Court of the United States, for the Northern District of California, Second Division, the hearing came regularly on before the Master on the 28th day of September, 1914. Thereupon to reduce the issues made by the pleadings, the parties duly stipulated as follows:

The defendant admitted the allegations set forth in paragraphs I, II and III of the bill with reference to the citizenship and incorporation of the parties and the character of defendant as a public service corporation. Defendant further admitted the allegations contained in the first paragraph of paragraph IV of the bill. With reference to the second paragraph of paragraph IV of the bill, defendant admitted that the complainant possessed an easement right for the carriage of water through the Nickerson

Ditch, as described in said paragraph, but did not concede anything with reference to the exact extent and nature of such right. In this connection the Master said to the counsel for defendant, "Do I understand, Mr. Cross, that your denial extends merely to the ownership of the ditch carrying the increased amount of water, or does it extend to having a ditch of any sort at all?" to which Mr. Cross replied: [93] "Oh, no; it extends only to carrying the increased amount of water." The truth of the allegation set forth in paragraph V of the bill was conceded with the exception that the defendant disclaimed any claim to that [94] portion of the Nickerson Ditch situated in section 2, township 22 north, range 3 east, and denied that it had forcibly entered upon and opened the ditch, or that it had injured the banks thereof, or that any of the water taken from the ditch had been wasted, or that the taking of said water was without right on its part. It was further admitted that the matter in dispute in said cause, exclusive of interest and costs, exceeded the value of \$3,000, as alleged in paragraph VIII of the bill, and that the Court had jurisdiction.

Thereupon complainant rested its case upon the pleadings and such admissions. Defendant then moved that the proceedings be dismissed on the ground that plaintiff had failed to prove a case, in that it had failed to show or prove the extent of the right of way or easement to the flowage of water through the ditch, and hence that the acts of the defendant constituted an invasion of that right. The ruling upon said motion was reserved by the Master

until two o'clock P. M. of the same day, at which time said Master rendered his ruling holding that a *prima facie* case had been made out on the pleadings and admissions, and denied defendant's motion. This ruling of the Master was duly excepted to by the defendant at said time.

EVIDENCE INTRODUCED BY DEFENDANT.

Evidence Introduced by Testimony of the Witness S. P. Moody.

I reside at Minnow Slide Mine, about three miles from Magalia, in Butte County, California. I have resided in that vicinity continuously since the year 1881, with the exception of the five years between 1900 and 1905, when I was away. I have been acquainted with the Nickerson Ditch and the Bader Mine in that vicinity since 1881. Directing my attention to the blue-print attached to the blackboard, and purporting to be a drawing of [95] sections 1 and 36 in the township described in the bill of complaint the black line marked "L B C" extending from A to B is Little Butte Creek. In 1881 there was a ditch heading in Little Butte Creek in section 36, or near there, called the Thompson Flat Ditch, or Powers Ditch, the location of which is indicated approximately by the red line C D on the map.

"Q. Was there any other ditch heading in Butte Creek in section 36 in 1881? A. No.

Q. Was there any ditch, used ditch, that formerly headed in Little Butte Creek, in section 36, in 1881?

A. No."

At that time, 1881, there was an old ditch that had formerly headed into Little Butte Creek run-

(Testimony of S. P. Moody.)

ning through section 36, known as the Delaplain Ditch. It came in about a mile and a half or a mile above the Powers Ditch. The approximate location of that old ditch is indicated by the blue line marked E. F.

(The map referred to by the witness was a rough approximation prepared by counsel and subsequently introduced into evidence as Defendant's Exhibit "A.")

When I was there in 1881 the Thompson Flat Ditch was in use but the Delaplain Ditch was not. The latter ditch was called the "Old Ditch." At that time it was in such a condition that it could be just seen in places that there had been a ditch; some old boards where it crossed gulches and the like. It could not carry water. About 1888 A. Nickerson bought the old Delaplain Ditch to pick up the water he brought from above through the Snow Ditch, the latter ditch emptying into Little Butte Creek above the head of this old ditch. I think he began the operation of this ditch in '87 or '88. He rebuilt the ditch on practically the same grade as the old ditch had been built, constructing a ditch in size about three feet on the bottom, three feet deep and five feet on top,—that is, five feet wide. He brought it down for mining or agricultural purposes, sold water to the ranches there, what he had to sell, and if he wanted any water down to the mine, took it down to the mine. [96]

"Q. Was that ditch used in the manner that Mr. Nickerson used it in '88 up to or continuously thereafter?

(Testimony of S. P. Moody.)

A. Well, the water was carried through the ditch and sold there to the ranches, and, as I say, if they wanted water at the mine, he always took it there to the mine."

I am not positive as to the exact grade upon which the ditch was built, but I think it was nine or ten feet to the mile.

"Q. Do you know the capacity of the ditch in miner's inches?

A. Well, it would probably carry anywhere from, we will say, 800 inches.

Q. You mean not to exceed 800 inches, is that the capacity?

A. If you carried the ditch full, say with more than you ought to pack in the ditch, it might take a thousand inches."

The ditch at that time would not carry more than 1,000 inches when filled to the top." [97]

In 1905 or 6 just before it was widened it would be difficult to carry over six hundred or seven hundred inches through it. You would have to figure that out. In summertime sometimes there would not be over 200 inches of water to go into the ditch.

In 1905 or 6 the Nickerson Ditch was widened to 5½ feet on the bottom; 7½ feet on top, and I should judge 5 feet deep.

The Snow Ditch headed into Little Butte Creek above Burnham's old mill, immediately above Inskip. It brought water from the Feather River watershed over into Little Butte Creek, and dumped the water into that Creek above the head-gate of the

(Testimony of S. P. Moody.)

Nickerson Ditch. It had been built years before the reconstruction of the Nickerson Ditch in 1888.

“Mr. CROSS.—Q. Up to what time did they bring the Snow Ditch water in?

A. Well, it was brought in—they had brought it in when I went there in '81, and the Snow Ditch, I don't know just when it went out of commission, but it was a couple of years or so after Nickerson put this continuation of the ditch in.

Q. A couple of years after '88?

A. Yes; I filed a water right on that same ditch in '97, I think, Riley and myself, up at Inskip, so it was an abandoned ditch at that time, the Snow Ditch.”

When Nickerson was taking the Snow Ditch water out of Little Butte Creek through the Nickerson Ditch the other water in the Creek went down to the Thompson Flat Ditch. I do not recall just how long Nickerson brought in the Snow Ditch water, but it was probably a couple of years after '88. I know that the Snow Ditch was an abandoned ditch in 1897.

With reference to the enlargement of the Nickerson Ditch in 1906, this enlargement extended from the head-gate down past the Bader Mining Company's land, which is situated in the northeast [98] quarter of section 1. At that time, 1906, a dam was put across Little Butte Creek so that the Nickerson Ditch took all the water flowing down Little Butte Creek. After that time the only water flowing down the Creek was at flood times, and seepage waters and springs, and the like. After this dam was put across

(Testimony of S. P. Moody.)

Little Butte Creek at the head of the Nickerson Ditch, it might have been five or six or ten inches flowing at the head of the Thompson Flat Ditch. There was a little water, but not enough for any practical purpose.

The Bader Gold Mining Company has been taking water out of the Nickerson Ditch practically all the time since I have. [99] been up there. I don't know exactly how much water it has used all the time because we picked the water up below. I should judge it is using now 150 inches, that being all the water now flowing in the Nickerson Ditch. The water, after it is used by the Bader Mining Company, goes into Little Butte Creek, and we pick it up down below. We use the water for mining at the Mineral Slide Mine in section 10. That is immediately south of section 1, cornering on section 1 in the same township. The Bader Gold Mining Company takes the water out of the Nickerson Ditch by a gate and flume and a pipe which runs from the flume. The gate has been in the ditch ever since I returned to the country in 1905.

Cross-examination.

I know Mr. Mowry. I do not know his connection with the defendant company, but know that he has charge of the mine, and has had such charge for about twenty years. The mine I am interested in lies somewhat south of the Bader Mine. The Bader Mine takes the water out of the Nickerson Ditch, uses it, and dumps it into Little Butte Creek, and we pick it up again.

(Testimony of S. P. Moody.)

“Q. It is a fact, is it not, that you are interested in having the judgment of this court that the Bader people shall be permitted to take that water out of the Nickerson Ditch? A. Not a particle.

Q. Isn't the Mineral Slide Mining Company putting up a part of the money to defend this litigation?

A. The Mineral Slide Mining Company?

Q. Yes, that is what I said?

A. You will have to get that information from the secretary.

Q. Don't you know that it is a fact that the Mineral Slide Mining Company has put up part of the money to defend this litigation?

A. Well, I could not swear positively to it.

Q. What is the best of your recollection and belief as to that? A. As to that? [100]

Q. Yes?

A. They might put up some money for it.

Q. Don't you know as a matter of fact that they are putting up money?

A. Well, I think there has been some money put up. I own half the stock of the Mineral Slide Mining Company.”

We desire these relations to continue, and I think our company has helped finance the defense of this action, though I don't know that fact of my own knowledge.

“Q. And you also said in 1906 a dam across Little Butte Creek was constructed at the head of the Nickerson Ditch?

A. As to the dam, I know there was a dam put in

(Testimony of S. P. Moody.)

there, but whether they put in the dam after they widened the ditch or before, I could not say.

Q. Didn't you testify that that dam was put in there in 1906?

A. I don't know. I can't remember whether I did or not.

Q. You won't swear that you did not, will you?

A. No."

There was a dam put in in Little Butte Creek in '87 or '88 when the Nickerson Ditch was built. I think there were two dams put in there. The first dam that was put in rotted down and went out. The exact time I could not tell for the reason that I was away for several years. I was away from the place from 1900 to 1905. I know that there has been another dam put in there, for it is not the same as the one that was in there before. I should judge that the present dam has been there eight or ten years. I don't know how long after the old dam went out before the new dam was put in. It must have been right away, [101] because they were taking water down to Paradise people all the time.

"Q. Now, after this dam was built at the head of Nickerson Ditch, did that prevent the water from flowing down Little Butte Creek to the intake of the Thompson Ditch, or the Powers Ditch, as you term it? A. Certainly.

Q. It did? A. Yes.

Q. When the dam was built across Little Butte Creek at the head-gate of the Nickerson Ditch, the Powers Ditch ceased to be used? A. Yes.

(Testimony of S. P. Moody.)

Q. And it was not used again?

A. Hold on. The Powers Ditch might have been used a short time after that. Nickerson Ditch was put in, which I think it was, just a short time."

The dam which was put in Little Butte Creek originally at the head of the Nickerson Ditch stopped the flow of water entirely down Little Butte Creek except the time of high water when some water went over the top of the dam.

In other periods of the year the dam would stop all the water flowing except in the case of a shower or rainstorm coming up when it might flow over the head of the dam. The dam which was originally at the head of the Nickerson Ditch stopped the flow of water entirely down the Little Butte Creek, excepting in times of exceptional high water, when all that could not get into the ditch went over the dam.

"Q. Now, how was it during the period of the year other than the winter, did the dam stop the flow of all water down Little Butte Creek?

A. It would stop it all the time with the exception of a shower, or something like that coming on, a rainstorm or something like that—then it would flow over the head of the dam."

After the construction of the head-dam in Little Butte Creek at the [102] time the Nickerson Ditch was constructed, the intake of the Powers Ditch was, after the first year or two, left practically dry except in periods of exceptionally high water. The second dam that I have referred to likewise stopped the flow of all water down Little Butte

(Testimony of S. P. Moody.)

Creek, excepting when the water was so high that it went over the top. During the summer all the water came down the Nickerson Ditch and none of it went into the Powers Ditch.

I have made no survey of the Nickerson Ditch, but have taken measurements. I never measured, however, the old Nickerson Ditch. The measurements I got were from a man by the name of North, D. B. North, who built the ditch. I have also been over the ditch thousands of times. I have no memoranda made by myself or under my direction. My testimony as to the size of the ditch as it was in '87 or '88 is from memory. My statement that it was three feet deep, five feet on top, and three feet on the bottom was an average. At the time the ditch was built Mr. North stopped with me and he gave me the data on the ditch right along. It sloped between 9 and 10 feet to the mile. I never measured the ditch myself. I measured myself a bracket that is left in the ditch that is practically the same size the ditch was when it was built, when Nickerson built it. This measurement I made a week or two ago. If I made any measurement in '87 or '88 I don't [103] remember it. My testimony about the number of inches of water that that ditch would carry was based upon observation. It would be a hard matter to give within 100 inches of how much a ditch will carry. One man will say that it will pack 800, another say 900, and another 1,000, and we don't know which is right. To make a statement as to the capacity of the ditch one should have measurements. The measure-

(Testimony of S. P. Moody.)

ments that I took recently were of a frame left across the ditch. It has never been removed since the time when they widened the ditch. It was located right in the center of the ditch at the Bader Mining Company's intake and spillway. This frame measured three feet seven inches in width on the bottom. It was three feet deep, I think. I do not see the exact depth on the memoranda I have here. This memoranda is in the handwriting of Mr. Cohn. This frame is the only place that we could measure approximately the size of the old Nickerson Ditch. I do not know that this frame was the original size of the ditch, but I know that the dirt never has been removed on either side of the frame. The ditch was cut out, but the dirt is lying right in there yet behind the frame. We measured the flume on the present Nickerson Ditch. That was thirty-four inches deep and six feet wide. This was made right above the Bader Mine above the spillway about a quarter of a mile. We also measured the ditch at Mr. Mowry's intake. The depth was five and one-half feet and seven and one-half feet on top. This measurement was made just above where the water was taken out and a little above the frame that I mentioned.

I measured it in one or two other places, but I did not set it down. These were made immediately above the spillway. I also measured the intake at Little Butte Creek. This intake is four feet seven inches at the small end—it is kind of tapering, and is four feet high. On the larger end it has two gates. These are two and one-half feet gates.

(Testimony of S. P. Moody.)

It is impossible to state what the carrying capacity of the ditch is by the number of measurements that I have made. It could only be stated approximately. One who is used to running [104] water in a ditch and has been around mines a long time and run power plants ought to know something near how much water is in a ditch. I did not make any measurements of the grade or slope of the ditch. I think that the Nickerson Ditch is carrying to-day about 160 inches. Its capacity, I should judge, is 2,000 inches. I admit that that is a rough estimate. I don't think my estimate would vary as much as 500 inches. It might vary a couple of hundred inches or 200 or 300. I would not be willing to swear that the estimate is correct within a couple of hundred inches, but only that I think the ditch is about a 2,000 inch ditch, approximately. It would economically pack 1,600 inches. I have no data of the measurements upon which I form my judgment as to the carrying capacity of the ditch at the time it was constructed. I do not know that in estimating the carrying capacity of a ditch you have to take the smallest place in the ditch. The old frame that I measured was somewhat, *i. e.*, approximately, near the size of the old ditch. All the water went through this frame. According to the data that I have that frame is larger than the old ditch. I said that the dirt had never been removed from in back of this frame, but I did not say that the frame represented the original size of the old ditch. From it the approximate size of the old ditch could be found.

(Testimony of S. P. Moody.)

When the Nickerson Ditch was originally constructed it stopped the water going down to the Powers Ditch except in exceptional high water, except for the first year or two, when they had to let the water go over to the Thompson Flat Ditch. After the first year or two they took up the water. After the Nickerson Ditch was built the Bade Mine got its water from the Nickerson Ditch. At one time I believe it got water from the Powers Ditch. The Powers Ditch went out of commission shortly after the Nickerson Ditch was built. The Bader Mining Company did not get its water [105] all the time thereafter from the Nickerson Ditch. There was a time that they had a ditch of their own constructed in the old Thompson Flat Ditch; that is, they used the site, taking the water to the mine at one time. They rigged up the ditch, put a head-dam in there and brought water to the Bader Mine. I don't remember the length of time that they did that—two or three years, or maybe four or five years, I could not say as to that. Then they ceased getting water from the Powers Ditch and got it entirely from the Nickerson Ditch. The Powers Ditch and Thompson Flat Ditch are the same.

The Bader Mine people never paid for the water they used from the Nickerson Ditch when I had the say of the ditch between '92 and '94 or 5. At that time they got water from me when they wanted it, but did not pay for it. They are not giving me the water now for the water that is in Little Butte Creek belongs to the Mineral Slide Mine. It is taken out

(Testimony of S. P. Moody.)

from the Nickerson Ditch at the head-dam, run down to the Mowry Mine, and dumped back into the creek again. We lay claim to all the water in Little Butte Creek. It is immaterial to us if there is a dozen ditches above us—it dumps right into the creek and comes down to us again. Our water right in Little Butte Creek was filed back in 1880 for 1,000 inches of water to be taken down at our head-dam in section 2. This is a couple of miles below the head-dam of the Nickerson Ditch. Thereupon adjournment was taken by the Master until the following day.

Redirect Examination.

I do not know of any money being advanced by anyone for the defense of this claim. I have not seen any money paid to Mr. Mowry or anyone for the Bader Gold Mining Co. for defending this suit, nor do I know of any money having been paid other than by the Bader Gold Mining Co.

The first dam was built across Little Butte Creek at the head of the Nickerson Ditch in 1887 or '88, when Nickerson built the [106] ditch. I could not state just when the second dam was put in. I think it was while I was away. I know it is not the same dam that was in there in the first place. The old timbers were round timbers, and the present dam is square timbers.

Subsequent to the building of the Nickerson Ditch in 1880 I was in the vicinity until 1900. After the erection of the dam I saw water flowing in Little Butte Creek below the dam. When the Nickerson Ditch was put in it was put in to pick up the snow

(Testimony of S. P. Moody.)

water. The Snow Ditch brought its water in and pumped it in Little Butte Creek, and the Nickerson Ditch picked the water up and took it around to the mine or other place down the ridge. The Thompson Flat Ditch was in at that time. I saw the water going over the dam to the Thompson Flat Ditch.

I returned to the country I think about 1906. I think it was in the fall of 1905 or 6 that the Nickerson Ditch was enlarged. I could not say positively whether the dam was enlarged at that time or not. After that time no water flowed down the Nickerson Ditch in the dry season at all. It flowed down only in the winter time,—in the wet season.

In explanation of my statement that I was in charge of the Nickerson Ditch I will say that McLaughlin and others owned the ditch at that time and they asked me to look out for it. This was in the winter time when the regular ditch tender was not on the ditch so I took charge of it and looked out for it and used the water, or did whatever I liked with the water. That is what I mean by taking charge of the ditch. This was somewhere about 1892. This was in the 90's, and was for one or two seasons. I am sure it was one season, but I don't remember whether I did two seasons or not. In the winter time they had no use for the water, and they would take their ditch-tender away. McLaughlin was interested with me in the mine and there was a verbal agreement between us that this water should go to the mine whenever we [107] wanted it. The Mineral Slide Mine used the water in winter. Some-

(Testimony of S. P. Moody.)

times it ran down the ditch and ran to waste. During the summer the water was used by the farmers.

Recross-examination.

I have talked with Mr. Cross since giving my testimony yesterday. Mr. Cross asked Mr. Cohn, the secretary of the Mineral Slide Mining Company, in my presence, whether an agreement had been made for payment for the defense of this suit. If the company has made any agreement concerning this, it is not known to me. The question of the Mineral Slide Mining Company paying part of the expenses of this defense was discussed. If Mr. Mowry needed it we would help him. I discussed with Mr. Cross about the dam that was put in at the head of Nickerson Ditch in 1888.

“Q. Didn’t you testify here yesterday after that dam was built no water flowed down Little Butte Creek past the dam, excepting in high water in winter time—didn’t you testify to that yesterday?”

A. If I did, I made a mistake. I don’t think that I did.”

After the Nickerson Dam was built in 1888 the Thompson Flat Ditch was running there. I did not testify here yesterday that the Thompson Flat Ditch was abandoned as soon as the dam was put across Little Butte Creek at the head of the Nickerson Ditch. In the summer time all the water there was in Little Butte Creek passed the Nickerson Dam after it was built in 1888. I never measured that water. The water actually ran down at all times of the year into the Thompson Flat Ditch. In the low

(Testimony of S. P. Moody.)

season I think there was approximately 300 inches that flowed down the creek. There was more water at that time in the dry season than now. I could not say how many summers that happened, but I saw it right after the Nickerson head-dam was put in, and before that. That was in the spring of 1888. In 1889 I think all the water in the creek ran down because they were fixing up the Nickerson Ditch at least during part of the [108] summer. They were working on the ditch all one summer. I could not say positively that it was 1889 or 1890. The Thompson Flat Ditch went out, I should judge, a year or two, or maybe two or three years after the Nickerson Ditch was put in, but I can't tell the exact date.

At the time when this water in the summer time flowed past the Nickerson dam the Magalia mine was discharging water into the creek above the Nickerson dam; that is to say, I think it was. [109] I do not know when the Magalia Mine ceased to discharge water into the creek, but I think it must have been some eight or ten years ago. The water from the Magalia Mine was pumped out of the mine and dumped into the creek. The Powers Ditch was abandoned soon after the Nickerson Ditch was put in, but I can't say just how long after.

I returned to the locality in 1905 and have been working at the Mineral Slide Mine ever since, except one season when it was closed down. The man who was working on the large Nickerson Ditch in 1906 was a man by the name of Murphy, with some

(Testimony of S. P. Moody.)

Chinamen. I don't know how many Chinamen there were, but there were quite a number, possibly ten or fifteen. I saw them working on the ditch at Slocum's place immediately below the Bader Mine.

McLaughlin never had the Snow Ditch that I know of. I refer to Col. Frank McLaughlin. He was a partner of mine in the Mineral Slide Mine. He bought the Nickerson Ditch or Nickerson turned this ditch over to him some time in 1889. He never owned the Powers Ditch.

Redirect Examination.

Our ditch is the Mineral Slide Ditch which is about two miles below the Nickerson Ditch, and also below the Thompson Flat Ditch. During the years up to 1900 we took water for the mine from Little Butte Creek during the summer, and we picked it up out of the lower ditch and sometimes out of the upper ditch. By the "upper" ditch I mean the Nickerson Ditch. When we wanted to take the water from the hill we used it that way and if we wanted to use it under the hill we used it from the other ditch. We would require the water on the hill at times for power purposes, in that way having a seven-hundred foot pressure. We got a bigger head from there, but we had all the water as far as quantity was concerned in our own ditch. [110]

Recross-examination.

We used this water at the Mineral Slide Mine at all times, summer and winter. Part of the time we were engaged in drift mining. The last few years we have not been hydraulicking, but we take the

(Testimony of S. P. Moody.)

water underground in the pipe, shoot the gravel down, and ground sluice it out. We have done no hydraulicking at the mine since 1883. We have hydraulicked in the summer time with water from the Snow Ditch. At that time they brought the snow water down and dumped it into Little Butte Creek and we picked it up, leaving the Powers Ditch their head of water, the water coming down to the lower ditch—the Mineral Slide. That was what the snow water was brought around there originally for in the early days for hydraulicking in the mine. Afterwards Nickerson took the upper ditch and led this water around the top of the hill selling some to the ranchers and using it at the mine when they wanted to. We had about 250 feet pressure in the lower ditch and could get that pressure at that time in the summer.

Evidence Introduced by Testimony of A. A. Davis.

My residence is at Oroville and I am superintendent of the plaintiff company. I know the size of the present Nickerson Ditch only in a general way. I have no data and have never made any measurements on the ditch and am not prepared to answer the question as to its size. As an approximation I should say that it carries between 1,200 and 1,500 inches, and I think this would represent the full capacity of the ditch.

Evidence Introduced by Testimony of D. B. North.

My age is 53, and I am a druggist at the present time. I was at one time engaged in connection with work on what is called [111] the Nickerson Ditch

(Testimony of D. B. North.)

in Butte County. I made a survey in 1888 and the ditch was constructed in the fall of 1888, and the spring of 1889. I was in charge of the construction, being manager and superintendent of the work. The ditch extended from the head-dam, which is about opposite Magalia, until it crossed the Magalia and Chico road on what was called the O'Donnell place then. The ditch was three feet on the bottom, three feet deep from the top of the grade peg, and five feet on the top from the grade peg across. The Chico and Magalia Road was below the Hader Mining Property. In laying out the ditch we followed the old Delaplain Ditch. When we went to work laying out the Nickerson Ditch the old Delaplain Ditch was practically all filled up with the exception of a little section of it that had been cleaned out by Dick Shipley and Charley Slocum; that is, they had merely cleaned the leaves out so they could get the seepage water for irrigating purposes. Shipley and Slocum claimed the right to the ditch. To quiet title, before I commenced the construction of the ditch I got what right they had to the water and then I hunted up Delaplain and got what right he claimed. Shipley and Slocum, if I remember right, claim somewhere around about ten inches of water that came in in seepage along the ditch. They had not gone to the head-dam at all. The grade of the ditch from the head-dam down across the Chico road was 9.60 feet to the mile.

In the winter time the water that came into the Nickerson Ditch came from Little Butte Creek, but

(Testimony of D. B. North.)

in the dry time of the season we depended upon water from the old Snow Ditch. I was there only a short time after the ditch was finished, leaving about the first of July, 1890. During the first summer after the Nickerson Ditch was finished while I was there the water dumped into Little Butte Creek by the Snow Ditch was measured as it was taken into the head of the Nickerson Ditch when there was any dispute. In taking [112] the water that flowed into the Nickerson Ditch from the Snow Ditch an allowance was made for evaporation between the mouth of the Snow Ditch and the head of the Nickerson Ditch. That was always figured, but I don't think we ever had to do it. We generally made an estimate of how much there was. We had a regular measuring box where we emptied it in and we always got along with the company there that owned the water called the Powers Ditch, and they had several different names. We always acknowledged their having the prior water right and in the low time of the season of course they were entitled to what water there was in Little Butte Creek.

After the Nickerson Ditch was constructed I turned the water in to test it. I put about 1,000 inches in. After that, when it settled down to business, I should judge that it carried 500 inches. After the first year it was constructed, we did not have much use for water out on the ridge. We brought it out there for the purpose of irrigating.

In October, 1891, I was appointed receiver of the Mineral Slide Mine in a suit then pending, and the

(Testimony of D. B. North.)

thereafter was retained as residing secretary of the company. The mine was not in operation during the short period that it was in litigation, a month or so, but as soon as that was settled it started up. During that time the Mineral Slide Mine obtained its water from the lower ditch—the Mineral Slide Ditch. Water was flowing in Little Butte Creek during all the time I remained there up until the first of August, 1892. I could not tell just how much there was running in the creek during the summer. The water we used for gravel washing came out of the old Mineral Slide Ditch. I do not recall whether the old flume out of the Thompson Ditch was used at that time or not.

I don't think that Mr. Nickerson is still living, though I don't know positively. He was very feeble the last time I knew [113] anything about him which was about ten years ago. I acted as his agent and engineer in the construction of the Nickerson Ditch, having charge of the whole operations, with full power to act in his place. His headquarters were here in San Francisco where I used to see him perhaps once a month. I was at the Mineral Slide Mine for five or six years prior to the reconstruction of the Nickerson Ditch in 1880, and during those years the water flowing from the Snow Ditch was measured. When we turned the water in we had to know how much water we were entitled to take past the Thompson Flat head-dam. The mine at that time was called the Magalia Consolidated Mining Company, Mr. Nickerson being one of the owners of

(Testimony of D. B. North.)

the company. Subsequent to that date, I think it was in the spring of 1888, Mr. Nickerson acquired the whole of the interest in the mine. After that interest was acquired he continued to measure the water that flowed in the Nickerson Ditch and took it out in the same way the company did. I do not recall whether we continued to measure the water of the Snow Ditch after the Nickerson Ditch was built. That was left to the upper ditch tender, and we did not have much use for the water during that summer. The time that we were careful about measuring it in or measuring it out was when we needed all of the water and when the other fellows needed all of their water, but during the summer after I had finished there what you call the Nickerson Ditch or enlargement of the old Delaplain Ditch we did not need the water there very badly that summer, and consequently we were not very particular about it.

Of course in the winter time when there was plenty of water we used the water from the creek. As near as I can remember I don't think we were using any water to speak of down at [114] the mine that summer, and that no water was being taken from the Creek through the Mineral Slide Ditch. During my time there, if we were going to use the water at the Mineral Slide Mine, we would let it continue down Little Butte Creek and pick it up in the lower ditch, and when we wanted to use the water from the top of the hill we took it out of the Thompson Flat Ditch.

(Testimony of D. B. North.)

Cross-examination.

I could not tell how soon after the year 1888 or 1889 that the Powers Ditch was abandoned, because I left in July, 1890, going on the reconstruction of the Miocene Ditch for McLaughlin. In 1891 I was at the Golden Gate Mine above Oroville, and then I came back to the Mineral Slide Mine that fall in the latter part of October, and was there until August, 1892. It is impossible for me to give any data on the time of the abandonment of the Powers Ditch. I remember one time when I was back through that country, I think that was about 5 or 6 years after I left there—they told me that the water was being dropped down from the Nickerson Ditch down through some ravine there, and picked up in the old West Ditch there in about Paradise, some place.

The Nickerson Ditch was constructed under my supervision, part by contract and part by days' work, and was well constructed. The head-dam that we put in in Little Butte was of round timbers and not very high. It was a substantial dam. It was filled in on the cribbed-dam style. It was not necessary to construct a very high dam to raise the water so that it would flow into the ditch. When a ditch is first built, the water cannot be run up on the bank without danger of a washout. After the bank has settled for a few years you can run the water up on it. To be permanent and substantial the bank would have to settle for two or three years.

During the winter there were times that a dozen ditches would not carry all the water flowing in

(Testimony of D. B. North.)

Little Butte Creek. There were head-gates at the intake of the ditch so that when they were shut down the water went down the creek over the dam. I was only there one winter after the ditch was constructed, and we had practically no use for water at that time, and I don't recall whether we run much water through it that winter or not. [115]

When I was superintendent of the Mineral Slide Mine we used water the year round. During the dry season the head-dam would take all the water flowing in the Creek. The dam has never been changed to my knowledge, but I have left that part of the country since 1892. There was springs between the Nickerson head-dam and the Mineral Slide Mine. The ditch gets dirty and its capacity decreases when it is not cleaned out. When I stated that the water dropped down to 500 inches in the ditch, I did not mean that that was its capacity.

Redirect Examination.

When I built the ditch I built it to carry 1,000 inches of water with safety when it was first built, and 1,300 inches after it had settled and been used for a few years.

When the water was flowing down Little Butte Creek from the Snow Ditch we regulated its flow over the dam by the gates and the intake of the Nickerson Ditch. We would lower our gates where the reservoir was which was made by the dam. These gates were always kept closed down so as to let just so much water under them, and the rest flowed over the dam. If you were taking all the water in the ditch you would raise these gates up.

**Evidence Introduced by Testimony of George B.
Mowry, Called by Defendant.**

I am sixty-six years old, and am the superintendent and manager of the Bader Gold Mining Company. I started mining on the Bader Gold Mining property on the northeast quarter of Section 1, Township 22 North, as described in the complaint and answer, on the 25th day of August, 1892, and have continued mining on said premises up to the present time, becoming the superintendent and manager of the company in 1900, when it was organized.

Referring to the drawing which was identified yesterday, I recognize the lines showing the location of Little Butte Creek, [116] the Thompson Flat Ditch, and the Nickerson Ditch. Little Butte Creek flows across the property of the Bader Mining Company as does also the Thompson Flat Ditch and the Nickerson Ditch. (At this point the map referred to was introduced in evidence by defendant and marked Defendant's Exhibit "A.")

The Bader Gold Mine is a placer mine. When I first began operations in 1892 the water I used in mining was taken out of the Nickerson Ditch. I continued to get water out of that ditch until 1899. After 1899 I secured the water out of my own ditch which I had located at the Thompson Flat Ditch. On March 17th, 1899, I filed a notice of appropriation of water in Little Butte Creek.

(Thereupon a notice of appropriation of water recorded at the request of George B. Mowry on March

(Testimony of George B. Mowry.)

18th, 1899, in Book F, at page 178, of Mining and Water Claims, Butte County Records, was introduced in evidence as Defendant's Exhibit "B," and said Exhibit was as follows:)

"Notice is hereby given to whom it may concern, that I, the undersigned, a citizen of the United States over the age of twenty-one years, in compliance with Section 1415 of the Civil Code of the State of California, do hereby appropriate and claim 500 inches of the water of Little Butte Creek, measured under a four-inch pressure. The place of diversion is a point on said Little Butte Creek in Section 36, Tp. 23 N., R. 3 E., M. D. M. and known as the 'Old Thompson Flat Ditch Head-Dam,' at which point a copy of this Notice is posted. That I claim and appropriate said water for mining, irrigating and power purposes and intend to use said water at the Bader Mine in the N. W. $\frac{1}{4}$ of Section 1, Tp. 22 N. R. 3. E., M. D. M. That I intend to divert said water by means of a ditch 20 inches on bottom and $2\frac{1}{2}$ feet on top and by flume 24 inches wide and 24 inches deep. This notice is posted on the 17th day of March, 1899.

GEO. B. MOWRY.

Witness:

C. W. BADER." [117]

In 1899 I constructed a head dam for the lower Thompson Flat Ditch, put in the flume, cleaned out the ditch, and brought the water down to the mine. At that time I owned the property that is now owned by the Bader Gold Mining Company and the reconstruction of this ditch cost me in the neighbor-

(Testimony of George B. Mowry.)

hood of \$5,000. I believe that ditch was 3 feet 6 or 7 on the bottom, 3 feet deep, and about 5 feet across the top. I first began to use this ditch in 1899. In 1900, after the incorporation of the company, we started hydraulicking and I flumed the ditch around and brought it in so as to bring the water down to sluice out the ravine. We were not using a giant at that time. At that time I used all the water—500 inches. I continued to use it until we had a slide in the ditch so that I had to shut the water off. That was in December, I think, 1900. I then went to Oroville and saw Mr. Smith who was president of the Oroville Water Company, and I made arrangements with him to run my water through the Nickerson Ditch for hydraulic purposes. I used the Nickerson Ditch for that purpose for three or four years. After I got the slide washed out in my ditch I brought my water through by running a tunnel through the hill and then I used both ditches. I used the water from the Nickerson Ditch for my giant, and the water from my ditch for sluicing purposes. I used the Thompson Flat Ditch for bringing in my water up to the time I quit hydraulicking in the latter part of 1904 or the first part of 1905. During this time I used water out of both ditches.

When we quit hydraulicking in about 1904 we ceased using the Nickerson Ditch, using only the Thompson Flat Ditch. I ran a small tunnel through the hill and brought the Thompson Flat Ditch to its mouth for the purpose of sluicing out the debris.

I quit using the Thompson Flat Ditch in 1906,—

(Testimony of George B. Mowry.)

the first part of 1906. This I did for the reason that the Oroville Water Company, in enlarging the Nickerson Ditch, diverted all the water [118] out of the stream so that my ditch was left without any water. That enlargement was made in the latter part of 1905 through my place. When they enlarged the ditch Mr. Murphy, the ditch-tender, diverted all the water into the creek from the ditch and ran it around me and dumped it down the next ravine below me into the creek. When he did that I opened the gate and began to divert my water out of the ditch down to the mine and have been so diverting it ever since. This was in the first part of 1906.

I was in San Francisco at the time the enlargement of the Nickerson Ditch through the Bader property was made, and was first informed of it by a letter from my brother-in-law. I went to see Mr. Goodwin, the president of the Oroville Water Company at San Francisco. I told him I objected to them going through the Bader Gold Mining Company's lands, and that I objected to them widening the Nickerson Ditch. He then stated, "Mr. Mowry, we will not widen it through your land." I said, "Very well." About a week or ten days after that I went up to Magalia and when I got there they had gone through my land. The moment they diverted the water I started to take it out of the ditch. I told Mr. Goodwin that I would divert the water that I had located out of that ditch down to my mine. I did not ask him the privilege to do so, nor did I pay him anything for it. I told him I would do so. He said, "If you do you will get into trouble," and I said,

(Testimony of George B. Mowry.)

“All right, I will get into trouble. It belongs to me and I am going to take it,” and I started in taking it, and there never was any objection made to it. Since I began the use of the water, neither the Oro Electric Corporation nor the Oroville Water Co., nor any of the companies owning the Nickerson Ditch, interfered with my use of it. I have never paid them anything for the use of the water. I paid them for the use of the ditch when I was hydraulicking from 1900 to 1904, but not since [119] that time. Since 1906 I have neither paid them for the water nor for the ditch.

In 1900 I had a gate constructed in the Nickerson Ditch with a flume, and then I have a pipe, sixteen or eighteen-inch pipe, I raised the gate and the water ran through the flume into this pipe and across down the hill to the mine. I am taking the water out of the ditch at the present time in the same way and through the same gate.

Prior to 1906 water flowed in the Little Butte Creek below the head-dam of the Nickerson Ditch the year round. The water taken into the Thompson Flat Ditch came from Little Butte Creek. I have used the water for mining purposes since 1906 at the Bader Gold Mine; that is to say, I have used it as superintendent for the Bader Gold Mining Company. This use has been continuous.

Cross-examination.

I don't know the grade of the original Nickerson Ditch. I was familiar with the ditch from 1892 on to this date. The first enlargement was made in 1905.

(Testimony of George B. Mowry.)

I was not up there at that time.

Major McLaughlin gave me the use of the Nickerson Ditch with all the water, from 1897 to 1899. This was in a writing which I had in my desk in the Sullivan Building on Bush Street before the fire. The right was given me for two years from about the middle or latter part of 1897 to the latter part of 1899, and at that time Major McLaughlin told me to go and take up a location of water and take the Thompson Flat Ditch to run it through. I have here some letters from Major Jones of Oroville, the attorney for Mr. McLaughlin, with reference to the use of the Nickerson Ditch, one dated February 4th, 1897, and one dated February 12th, 1897, Major McLaughlin came to Magalis and stayed there all night at the hotel, with Louis Glass and Del Walsh and some man from the Mining [120] Bureau. I had at that time a long conversation with the Major in regard to the ditch and the water, and he advised me to go and take the location, and he said, "I would give you this ditch but it don't belong to me, it belongs to Cutting, but," he said, "we have no location and all the water we run through there is from the Snow Ditch. You go up and take up a location and locate the Thompson Flat Ditch and take the water down to your mine and you have always got it."

Mr. ORRICK.—I move that what Major McLaughlin said to him with reference to the Snow Ditch go out as incompetent.

He had the ditch at the time he made these statements, was the owner of the ditch, but it was tied up

(Testimony of George B. Mowry.)

in some way. He did not tell me how, but certainly he had the ditch. I was dealing with Major Jones as representing Major McLaughlin.

Thereupon the letters referred to were fastened together and introduced in evidence, marked "Plaintiff's Exhibit 1," as follows:

Plaintiff's Exhibit No. 1—Correspondence, A. F. Jones to George D. Mowry.

"Oroville, Cal., Feb. 4th, 1897.

Geo. D. Mowry, Esq.

Magalia, Cal.

My dear sir:—I must beg your pardon for not writing to you sooner in regard to the Nickerson Ditch, but I was called away the day after I saw you to San Francisco and I wished before writing to communicate with Major McLaughlin in whose name the ditch stands although I have the management of it. He will arrive in Oroville on the late train tonight. I presume from the looks of things you have had water enough this week anyhow. I will state that I have considered the matter myself and it is satisfactory to me provided we can agree upon the time for the term for which the agreement is to run as of course we do not wish to tie it up for any number of years. Hoping you will excuse the delay, I remain

Yours very truly

A. F. JONES."

(Testimony of George B. Mowry.)

“Oroville, Cal., Feb. 12th, 1897.

Geo. B. Mowry,

Magalia, Cal.

Dear Sir:—I had a talk with Major McLaughlin about the Nickerson Ditch and your proposition in regard thereto. He agreed with me that we would let you have it, the only question being length of time for which it is to be tied up in that way. What do you think about two years from date?

Yours very truly

A. F. JONES.”

“Oroville, Cal., April 17th, 1897.

Geo. D. Mowry,

Magalia.

Dear Sir: What has become of contract regarding ditch sent you some time since?

Yours respty,

A. F. JONES.” [121]

I was down on the Bader Mining property in 1891. When I made my water location in Little Butte in March, 1899, I cleaned out the Powers Ditch, put in a long flume and a head-dam. Mr. William Hendrix and Ed McKenna and E. O. Warren put in the head-dam for me. I have no vouchers showing the expenditures made by me on the ditch. They were destroyed in the fire of 1906, but it cost me in the neighborhood of the amount I estimated.

In 1900 I incorporated the company with the intention of starting hydraulicking. We started in in 1900 and continued hydraulicking for about four years until the latter part of 1904. We commenced

(Testimony of George B. Mowry.)

working on the Powers Ditch within sixty days after March, 1899. I don't remember how long it took us to do the work, but it took a long time because we had a very hard time in getting timbers. It was finished in that year, I think possibly within ninety days after we started work. During these four years when we were hydraulicking I hired the Nickerson Ditch paying \$50 a month for the privilege of running my water through it. This is not the agreement referred to in Mr. Jones' letter,—that was in 1897. My ditch went out in 1900 and I saw Mr. Smith, the president of the Oroville Water Company, with reference to the use of the Nickerson Ditch, and made arrangements with Mr. Smith to run my water through that ditch to wash away the slide where my ditch had gone out. This agreement was a verbal agreement and it did not cover any specific time. I do not know where Mr. Smith is at the present time or whether he is living or not. I think this arrangement was made in December, 1900. We continued the use of the ditch under this agreement until the latter part of 1904. Then we quit this use because we quit hydraulicking and had plenty of water for drifting purposes from the Thompson Flat Ditch. At that time I think I got through the Thompson Flat Ditch over 200 inches. In the summer I would get probably 100 or 125 inches. The distance is about two miles from the Bader Mine to the head-dam of the Nickerson Ditch. [122]

I continued to use the Thompson Flat Ditch up until the Oroville Water Co. diverted all the water

(Testimony of George B. Mowry.)

out of the stream and took it into the Nickerson Ditch in the latter part of 1905, or early part of 1906. When I saw them working on the ditch they had got within my place and were working below my spillway. I know they had gone through my place because I saw the ditch had been widened. After the ditch was widened the flume was 6 feet in the clear and 34 inches high, with a space left there in which they could put a 6-inch board. This flume, I should judge, is in the neighborhood of 60 feet. I do not base my statement that the ditch was enlarged entirely on the fact that this flume dimension was increased to six feet in the clear, but also upon the measurements of the ditch made a week ago. I measured it in numerous places along the ditch from the gate to the head-dam, probably four or five measurements. Mr. Moody was with me at the time and are the same measurements referred to by me. We made no measurements of the grade of the ditch. I have never made any calculations in regard to the pressure, nor measured the grade of the ditch. I made my calculations by just figuring the distance across, and the heights, and multiplying it. It is 72 inches across. But I have never made any calculations in regard to pressure, because if the water is flowing swift, certainly it will carry more water than it would under a minimum of pressure. I did not take any measurements at the weir or take the current of the water. Every time I went up and down the ditch I looked to see how much water there was. I go up and down every day.

(Testimony of George B. Mowry.)

Mr. Laas Landsburger is the president of the Bader Gold Mining Company and the Board of Directors is composed of Mr. Belingall, W. J. Newman of Newman & Levinson, Harold Werner and Albert Bender. I am superintendent of the company and have been such since 1900. My brother-in-law, Charlie Bader, acts as foreman under me [123] when I am not there. I am up there most of the time. My brother-in-law ended his connection with the mine, that is working steady there, probably six years or more. Up to that time and while he was working there he would take charge while I was gone. When [124] I was there he did blacksmithing and sometimes would work underground.

I have two men working at the mine at the present time. During this year I have had four men working in two shifts, just as many as I could work handy. Once in 1905 I had three shifts going, three 8 hour shifts, 2 men on a shift. I was running a tunnel at that time and dumping out a little gravel. I generally don't run over two shifts because I find it does not pay. When I was drifting I would have more men. During the last five years the greatest number of men I have had working there at one time was not over five, besides myself. Mr. Bader has always lived there.

My arrangement with Major McLaughlin was that I would have the use of the ditch and all the water there was in the ditch. The only thing I had to do was to look out for it from my gate to the head-gate. I did not testify this morning that I was authorized

(Testimony of George B. Mowry.)

by Major McLaughlin to bring my water through the ditch. I had no other contract for the use of the ditch other than the one with Major McLaughlin and the one with Mr. Smith. I never had another contract. I hired the Nickerson Ditch for the purpose of taking my water through and that was the agreement. I did not purchase any water from Smith, but just the use of the ditch, nor did I ever get any water from Smith. I paid \$50 a month for the use of the ditch at first. The ditch changed hands and afterwards they raised me to \$75 a month. This I paid for the use of the ditch up to the time I quit in the latter part of 1904. I have no receipts for these payments. Bills were sent me and they were burned up here in the fire of 1906. When I made my report I turned in the vouchers to the secretary of the company. The payments were made by check and the bills were sent to the mine, and then forwarded down here. Whenever we had a meeting, which was sometimes twice a year, and sometimes [125] only once a year, I would make out my reports and file all the vouchers with them. The only book that I kept for the company was the time book. The account-books were kept by the secretary here, and were also destroyed in the fire. I have some of the time-books up in the mountains. These show the payments made to the men and the number of shifts, but no payments made to the water company. I have no book or report of any kind evidencing the payments to the water company. I am per-

(Testimony of George B. Mowry.)

fectly positive they were made for the use of the ditch.

I received some bills from the water company which I did not pay. They sent bills to me two or three times in late years. I got two by registered letters; the year I can't recall. These I destroyed and threw away, then Mr. Lincoln the ditch-tender presented a bill to me one day. The bill always came to \$60 for the use of water. It did not say whether it was for one month or one year or ten years; it was always \$60. I received one of these bills one year and probably a year and a half afterwards I received another one. I paid no attention to them. Mr. Lincoln presented the last bill, I think, in 1910. I asked him, "Where did you get this bill from?" and he said, "It was sent to me from the office in Oroville." I said, "Send it back with my compliments." I paid nothing; I do not recognize the Oroville Water Company at all.

I recognized the Oroville Water Company down to the latter part of 1904 to the extent of paying them for the rent of the ditch. After the ditch was widened I did not even pay them for the rental of the ditch because then I took the water that belonged to me out of the ditch. I never had any trouble with the water company in their shutting off the water. I am not sure whether they shut off the water or not. My gate has been closed down and I have always opened it, but I never seen them close it down. It has been closed down, I think, two or three times. I know it has been closed down. I sent Tom Irwin

(Testimony of George B. Mowry.)

up there [126] to keep the gate open. I think this was in 1912 when the Oroville Water Company, I believe, put an armed man on the ditch; at least I found an armed man on the ditch with a rifle, and six-shooter. That was in July, 1912, and my gate was closed down. I came up the hill to see what it was and I found this man there. I asked him, "Did you close that gate down?" and he said he did, and he kind of had his gun, and he moved around, and I saw he had a constable's badge on him, and I asked him, I says, "Are you here in an official capacity, have you papers to serve on me?"—at first he told me he had closed the gates down. Says I, "Have you papers to serve on me in regard to this ditch?" He said, "No." "Are you here in an official capacity?" He said, "I am not." Then I says, "You are a trespasser on my ground; I wish you would get off of it." He looked at it and he says, "This ditch belongs to the Oroville Water Company," I said, "If they own anything, it is in the center of the ditch; you will have to get in there." He said, "How far does your ground run?" and I said, "Clear across the railroad track"; so he left and went away. I raised the gate and brought the water down the hill again to the mine. Then I went home, and the next morning I figured that he would be back there again, so the next morning I went down,—at least I did not go down, and I got Mr. Erwin to go down with my men when they were going to work; there were three men going to work that morning; that was my nephew, George Malloy, a young man

(Testimony of George B. Mowry.)

by the name of Hawkins, I believe it was, he went down, and my nephew. I went down about noon and I saw Mr. Erwin, and there was no man there excepting Mr. Erwin; the water was still running to the mine; I went down to the mine and commenced doing the washing. In the afternoon Mr. Erwin and this man stood on the hill looking down at me washing, and I looked up and I had no more trouble, the water kept running to me. [127]

I saw a notice posted up there with reference to the water. I have here one with a skull and cross-bones on it that was posted on the gate of the spillway on July 29th, 1912. There were other notices posted there forbidding anyone touching that gate. I had a notice there also forbidding anyone touching the gate. I do not remember of seeing any notice other than the skull and cross-bones one, and the one that I posted. I posted my notice a long time ago when I found my gate closed down one time. I thought probably that the boys came up and closed it down for some reason or other, and I put another notice on it for nobody to interfere with that gate—that it belonged to the Bader Gold Mining Company.

Mr. Murphy was the one that had the men working there cleaning and widening the ditch. I don't know whether he is dead or not. I have never seen him since he was working there. I don't recall whether Mr. Murphy came to collect the bill from me or not. Mr. Davis talked to me once about the use of the water there. I met him in the store of Cohn & Gooday. He came there and inquired for me, I had

(Testimony of George B. Mowry.)

never met Mr. Davis before that, and he asked Mr. Cohn for me, and just then I happened to come into the store and Mr. Cohn pointed out me and he says, "There comes Mr. Mowry now." So I walked down and Mr. Cohn introduced me to Mr. Davis. Mr. Davis says, "Are you Mr. Mowry?" I says, "I am." He says, "Are you using water out of the Nickerson Ditch?" I says I was. He says, "Do you know that that ditch belongs to the Oroville Water Company?" I said "I don't know anything about it." "Well," he says "it does." I says, "Well, I don't know anything about it." He said, "Don't you know that you have no right to use it?" I said, "No." "Well," he said, "I have come up here to serve an injunction on you." I said, "All right, Mr. Davis, serve your injunction. I will promise you that I won't ask for ten days to answer it in." "Well," he says [128] "How much water are you using?" "Well," I said, "I use all the way from 100 to 150 or 200 inches, and sometimes I take all the water there is in the ditch." "Well," he says, "haven't we got any rights there?" I says, "I don't know whether you have or not; the only way you can find out is by serving your injunction." He says, "Can't we make arrangements to give you so much water?" I says, "No, sir." Says I, "the only thing you can do it to turn this water down the creek where it belongs and I will pick it up in my own ditch and I will not interfere with your ditch but," says I, "just so long as you take the water out of the creek into that ditch I will take my water out of that ditch." "Well," he says, "haven't we

(Testimony of George B. Mowry.)

got any rights there?" I says, "I don't know; serve your injunction and we will find out." I says, "There is no use of you and I having any words here; you represent your people and I represent mine; let it go into court and be passed upon by the court." "Well," he says, "I will leave that for Mr. Goodwin to do." "Well," I said, "you needn't be afraid, Mr. Goodwin will never serve any injunction on me. I know Mr. Goodwin pretty well and he knows me." I said, "I am working under the instructions of my attorney." So he went away, and I have never spoken to Mr. Davis, I don't think, since, never have spoken to him since on the water question. That was in 1909. Nor has he ever spoken to me about the water, but I have seen him frequently; I used to see him in town there, I seen him at Chico, I seen him in Oroville, and just passed the time of day, that is all. The bills I received from the Water Company by mail I destroyed. I paid no attention to them at all. I developed water on the Bader mine in the tunnel.

We have some water running out of the tunnel in the mine. It runs down and runs on through with the rest of the water. I took all the water this summer and in 1912 took all the water. I took all the water also in 1909 because I had a big cave there and I had to use it for sluicing out the cave. It closed up all my tunnels. At that time I let the water run through there during the [129] night while the caves came down, to keep that washed out, and do so even now if a bank caves. There is a big bank where I hydraulicked out, an immense cut and the air slacks

(Testimony of George B. Mowry.)

it, and it keeps caving down, and that is the reason I have to use so much water to get this dirt away from there from covering up my tunnels. I am not operating at night at the present time. Probably it takes me two or three hours to do the washing during the day. I let the water run right through there at night. The people from Paradise came to me and I turned the water down to them this summer. They told me that they needed water and asked me if I would let them have it and I said, "Yes, I will give you the use of the water from three o'clock in the afternoon until five o'clock in the morning." They told me they had made a complaint to the Railroad Commission. I said, "All you have to do is to come to me and any time I can assist you or help you out I shall surely do it." I continued to do that as long as they asked me, for two weeks—the two weeks ending about two or three weeks ago.

"Q. Don't you know that to-day there are crops that are perishing for want of water?

A. No, they told me there was not; they said they had been relieved.

Q. They said they did not want any more water?

A. They only took it for two weeks."

They have not asked me for more water since. I wrote down to my attorney here in regard to what they asked me and that I would like to accommodate them, so he sent me up a contract for them to sign, and six of them signed it and I turned the water down to them. How many used the water I don't know, but I turned it down to accommodate these six

(Testimony of George B. Mowry.)

men who asked me for the use of the water. I have never done any farming myself. [130]

I don't remember whether I used the water at night time in 1910 or not. I don't think I did. I don't know whether I used all the water during that year or not. I took what I needed. What I did not need I used to let run down the ditch for the benefit of the farmers at Paradise.

“Q. Are there quite a number of these farmers that are dependent upon the Nickerson Ditch?

A. That I don't know.

Q. Don't you know as a matter of fact that there are a large number?

A. I don't know as a matter of fact that there are.

Q. You never have been down in Paradise?

A. I have been through it, coming up and down on the train.”

I have been through Paradise coming down on the train, but have never been there. I don't recall how [131] much water I took in 1911, but I took all I needed. I might have taken all of the water. If I needed it at night time I took it. I needed more water in 1912 than in previous years, because I had a big cave and had to sluice it out.

Redirect Examination.

At the time when I was using water from both ditches before 1906, I had probably 150 inches in the lower ditch—the Thompson Flat Ditch. This water came from Little Butte Creek. I used the two ditches from 1900 up to the latter part of 1904.

When I returned to the Bader Gold Mining Com-

(Testimony of George B. Mowry.)

pany's property after being notified that they were about to enlarge the ditch I went up the ditch and I could see where they had enlarged it and thrown the dirt up on the lower bank. It was all fresh dirt. There was a new cut on the upper side of the ditch. They cut that out to widen the ditch, threw the dirt up on the lower bank. This dirt was thrown up two feet higher than it had been.

From the measurements that were made a week ago today the Nickerson Ditch measured across the bottom five feet and a half in the clear, and 7 feet across the top—from the top of the grade stake to the stop of the grade stake. I measured the depth of the ditch by a stick and I had a 2-foot rule that I measured it off on. We measured it up to the level across the top of the bank; we measured to the top of the bank of the ditch. The upper bank is much higher than the lower, and we measured to the top of the lower bank.

All the bills that were received since 1906 were destroyed. The bills before 1906 were paid. The armed man who I found on the ditch in July, 1912, told me that he was sent by the Oroville Water Co; that is all I know about it. My reason for letting the water run at night in the mine was on account of the fact that if a bank would cave it will wash it out. I have a flume in [132] there, a 40-inch flume that carries away all my waste dirt. I have a hopper there that I dump my gravel into, with my flume, that I wash the gravel through. Where my water is I have even built a dam across there where my gate is

(Testimony of George B. Mowry.)

there now so that I have to reservoir the water to wash it away, because there is not water enough there to wash away the debris; so I shut this gate down and reservoir the water and then open it to sluice everything out of my big flume.

I find that allowing the water to run to the Paradise farmers three or four weeks ago made a difference. When I let it run down there on a Saturday at three o'clock and let it run all Saturday night and all day Sunday until Monday morning I find that when the water was taken out of our flumes that they shrunk and commenced leaking.

Other than the conversation I had with Mr. Davis in 1909 the Oroville Water Co. never objected to my using the water or the ditch. That is the only conversation I ever had in regard to the ditch with any one connected with the Oroville Water Co.

Recross-examination.

The water was cut off two or three times—once in 1912 and this year, and I don't remember the other time, but it has been cut off two or three times, I don't know whether the gate has shut itself or whether the boys went in there because sometimes I have had it where the boys came along up by the head-dam and shut down the gates and turned the water all off down into the creek, and we have not had any water there. I remember one time that Mr. Lincoln, the ditch-tender, he was coming up, and I had been up ahead of him and found the gates closed, and I opened it and turned it down—I met him there and I said, "Somebody turned the water off." He said,

(Testimony of George B. Mowry.)

“Yes.” I said, “I don’t know who it could have been. I have been up and opened the gate and turned it down again.” He said [133] “Sometimes boys do that there to catch fish or get fish in the ditch.” My gate has been closed down two or three times prior to 1912—in 1912 and I think twice before that. In 1909 it was closed down. I think 1909 was the first time it was ever closed down.

Redirect Examination.

When I found my gate closed down I went up and opened it. It did not remain closed longer than 20 or 25 minutes. It took that time to walk up from the mine to the ditch. When I was hydraulicking I used the whole of 500 inches. As I mine now in case of a cave I have to use that amount to wash it out. In washing out the gravel I will probably use 100 or 125 inches. When I have a dump or refuse dump I have to use a big quantity of water to wash it out of the flume into the creek. After I have washed the gravel out the water runs into Little Butte Creek on my land. The creek comes right through our land and goes down through the country extending about a half a mile through our land. The Nickerson Ditch also extends for about the same distance through the land.

When I returned to the land after I heard they were making the ditch larger they were excavating the ditch below. There was evidence that the ditch had been enlarged there through our land other than the fact that they were excavating below. There was new soil where they had cut into the bank on the up-

(Testimony of George B. Mowry.)

per side and where they had thrown earth on the top of the ditch on the lower side raising it over two feet.

Recross-examination.

I always paid the water company flat amounts of \$50 up to the time the amount was raised to \$75. I do not know who raised it to \$75. I do not recall of paying any odd amounts like \$40 in March 1899, and \$20 in March, 1899. As I remember, I always paid it by the month at \$50 or \$75, as the case might be. When I got the bill I would send a check. [134]

Evidence Introduced by Testimony of A. C.

McCubbin, Called by Defendant.

I am forty-four years old and am to some extent familiar with Little Butte Creek and Bader Gold Mining Company's property. I went up in that country in March, 1905, and left it in June, 1910.

When I was up there in 1905 I saw water flowing in what they call the old Powers Ditch, the ditch that Mr. Mowry appropriated, running down to his mine. This was about the first of May, 1905, and the water was going from Little Butte Creek. I can't say positively as to whether the water continued to run in there after that up to the time I left, but I remember positively in the spring of 1905 of seeing water running in Mr. Mowry's ditch.

I am acquainted with the Nickerson Ditch to some extent, and know where it extends through the Bader Mining Company's property. I saw work being done on that ditch through the Bader Mining Company's property in 1906. There was quite a large gang of Chinamen working there, I should judge 50

(Testimony of A. C. McCubbin.)

or 60, perhaps 75. They were enlarging the ditch. They were enlarging it, I should judge, so that it would surely carry twice the water that it did before. They took most of the ground from the uphill side and raised the bank of the ditch. I should judge they took a couple of feet of dirt from the uphill side and widened the ditch and raised the lower bank a couple of feet. That would make the ditch deeper than it was before.

Cross-examination.

I am engaged in mining at the present time in Mariposa County. I have no stock in the Bader Mine. I could not tell just what month it was that I saw the Chinamen working on the ditch. They were working along through Mr. Mowry's land between what they call the Wagstaff Ranch and the head-dam. I am not familiar just [135] with the line of Mr. Mowry's land, but I am pretty positive the work was on Mowry's land, probably about the southerly line. It was in the fall of 1905 or the spring of 1906 that the ditch was enlarged; I don't remember just when; it was during the five years I was up there in that country. As near as I can remember I don't think it was in 1907; I would not swear it was not in the year 1907 because I am not positive on the dates. I am unable to swear in regard to dates, but I do swear that the ditch was enlarged during the time I was there in the Magalia District from 1905 to 1910. It was during the five years that I was up there in that country. I never made a measurement of the ditch, but I saw the men work-

(Testimony of A. C. McCubbin.)

ing there and drew the inference that they were enlarging it.

Redirect Examination.

In going to Magalia I would walk along the lower bank of the Nickerson Ditch. There was a good trail along the bank—better than taking the county road. in going up to Magalia I would walk through the Bader Company's land. I should judge I was over the ditch three or four times when I saw men working between the south line of Mowry's land and the head-gate of the Nickerson Ditch. I went by the Nickerson Ditch to walk to Magalia a mile and a quarter, or a mile and a half below the Bader Mining Company's property. I was at that time at the Mineral Slide Mine. I would walk from the Mineral Slide Mine along the Nickerson Ditch until I got near the Bader property and then went up the hill to the town. I saw the Chinamen working up as far as the head-gate and knew for a fact that the ditch was enlarged to the head-dam, and that it was enlarged through the Bader Mining Company's property at that time.

As near as I can remember I think the work was started in the fall of 1905, the same year I went to the Magalia District; that is the best of my recollection. The enlargement was during the first part of the five years I was up there and to [136] the best of my recollection was in 1905 or 1906.

Recross-examination.

I know for a fact that the ditch was enlarged the entire way but I don't want to swear just the place

(Testimony of A. C. McCubbin.)

where these men were working. I know there was a big camp of men there, 50 or 60 Chinese, and I know the ditch was enlarged to the head-dam. The camp of the Chinese was below the old Slocum Ranch above Wagstaff's, and before you get to the Bader property.

“Q. (Mr. ORRICK.) Will you swear as to the work that you saw them doing, if they did any, above the spillway was not merely cleaning out? I am speaking of the work above the spillway? Will you swear as to that?

A. The ditch was enlarged the entire distance.

Q. That is what you keep on telling us, but I want to know whether or not you can say that any work that you saw with your own eyes done above the spillway, whether that was cleaning out work or actual enlargement? A. It was actual enlargement.

Q. An actual enlargement? A. Yes.

Q. Now, can you fix in your mind any occasion when you saw actual enlargement above the spillway?

A. Well, I say again that I do not swear to this place where I seen these men actually doing the work, but I know for a fact the work was done to the head-dam.

Q. You know some work was done to the head-dam?

A. Yes.

Q. You would not be able to swear whether that work that was done between the spillway and the head-dam was merely cleaning out or actual enlargement, would you? A. It was an enlargement.

(Testimony of A. C. McCubbin.)

Q. But you cannot name any time—any distinct place?

A. I do not want to swear that I seen them doing actually this work in any distinct place.

Q. Supposing a man took out sands that had fallen into the ditch, earth, dug that out, would you term that an enlargement? [137]

A. I would not; I would call that a cleaning out.

Q. You would call that a cleaning out?

A. Yes."

Redirect Examination.

The Slocum place I referred to was a ranch house below the Bader Mining Company's property. I know that the ditch was enlarged as distinguished from being cleaned out; from the way it was dug out. The bank was cut down from the upper side and the lower bank filled up. I saw fresh cuts where the earth was moved and the bank built up. I saw the ditch before the work was being done, and I should judge the ditch was widened two feet and the lower bank raised two feet. It would be virtually deepening the ditch as well as widening it two feet.

Recross-Examination.

I never measured the ditch before its enlargement, but I should judge that it was about three feet wide on the bottom and maybe four feet and a half on top, and three feet deep, probably. When it was enlarged I think it was 6½ feet on the top and about 5 feet deep. I have had some experience in building ditches.

(Testimony of A. C. McCubbin.)

“Q. (Mr. ORRICK.) When there is a slide, Mr. McCubbin, in a ditch and you go to clean that out, don't that very often show evidence of earth and rock somewhat as if there was an enlargement?

A. It would in places, but when a ditch is enlarged it is an easy matter to see the imprint of the tools.”

**Evidence Introduced by Testimony of L. Cohn,
Called by Defendant.**

I am forty-nine years old and have resided at Magalia since 1882. I think I recall the Delaplain Ditch. It was an old ditch line running through there, a dry ditch. I think that was the same line upon which the Nickerson Ditch was afterwards built. Prior to the year 1888 or '89 the old Delaplain Ditch was filled up and just showed the lines of an old ditch. [138]

From 1901 on I paid some attention to the condition of the water flowing in Little Butte Creek below the head-dam of the Nickerson Ditch, but not prior to that time. In the years 1901, 2, 3 and 4 there was what we considered a good reasonable head running down the creek,—a head large enough to wash up tailings and anything we really needed about the mine. I am speaking of the high season, for in the winter time there was an abundance of water. In the dry season there was always from 150 to 300 inches. That is simply an approximation, for I did not measure it.

They cleaned out and enlarged the Delaplain Ditch, making it about 3x3x5: 3 feet deep, 3 feet at

(Testimony of L. Cohn.)

the bottom, and 5 feet across the top. The ditch remained in that condition, as I remember it, up to either the fall of 1905 or 1906. At that time it was made larger. I could not say to just what extent it was enlarged, because I never paid particular attention to it until just lately. Lately I measured the flume and took one measurement of the ditch. The flume was just above the intake of the Bader Mine where the spillway is. At the present time it is 6 feet on the bottom, and the sides are composed of 18 and 16 inch boards, with a space for a 6 inch board on top. I measured the ditch right at Mr. Mowry's gate. It was $5\frac{1}{2}$ feet wide on the bottom, $7\frac{1}{2}$ feet wide on top, and $4\frac{1}{2}$ to 5 feet deep.

I do not know exactly what use Mr. Mowry makes of this water at the Bader Mine. I knew he used it for mining purposes. I was never there while he was using it, except once and at that time he was running out his slide in the cut, sluicing with it.

Cross-examination.

I have a store in Magalia and am interested in the Mineral Slide Mine, and am interested in other property in the vicinity of Magalia and surroundings. The Mineral Slide is located south [139] or southeast of the Bader Mine. The only place we used water that comes through the Bader Mine is at the Mineral Slide.

I am secretary and one of the directors of the Mineral Slide Company. Mr. Mowry and myself are associated together in the defense of this case. I have consulted with him with reference to the case

(Testimony of L. Cohn.)

because I had interests at stake and wanted to know what was going on. The interests that I have at stake are my ownership of stock in the Mineral Slide Mine and in the Bader Mine.

The Mineral Slide Mine has no agreement with the Bader Mine whereby the Bader Mine agrees to let them use the water they get out of the Nickerson Ditch. The Mineral Slide uses the water out of Little Butte Creek. They use the water that comes through the Nickerson Ditch after Mr. Mowry uses it and Mr. Mowry drops it back into the creek prior to reaching the head-gate of the Mineral Slide Mine. I don't know what water, if any, the Bader Mine gets through the old Powers Ditch. I don't think it gets any. The Powers Ditch is out of commission. The water that is used in the Mineral Slide is picked up in Little Butte Creek. As to the amount that is taken out of the Bader Mine I have never measured it and I don't know what amount it takes out.

From 1901 to 1904, as I testified, there was a good reasonable flow of water in Little Butte. In 1904 I sold the Mineral Slide Mine, which was then the Magalia Consolidated, and belonged to an English Syndicate, to A. A. McCubbin. He is the gentleman that has just testified. I was agent for the English Syndicate and sold the property to McCubbin. The property sold was the Mineral Slide Gold Mining Company's holding, or what was then called the Magalia Consolidated Mines of London. There was water in the creek after 1904, but after I sold the mine for the [140] English Syndicate I paid no

(Testimony of L. Cohn.)

further attention to it. I could not say whether there was the same amount of water as theretofore because I never measured it. I observed the water flowing in the creek between the years 1901 and 1904 because I was running a pack train and delivering goods down into that country, and as I would cross the ditch I would take notice of the water. In the winter time there was ample for everybody. There was water there all the way from 1,000 to 2,000 inches, going down the creek. In the summer time the water was low. I would judge then there was from 150 to 300 inches; that was during the dry season.

For the period after 1904 when I was down there I did not take the same interest. I again became interested in the Mineral Slide property in 1910. I did not pay any particular attention to the actual conditions between 1904 and 1910 any further than just the interest of one interested in the welfare of the country.

I did not make any measurements of the Nickerson Ditch in 1889, but I had the measurements. A certain M. A. Glover took a contract on different sections of the ditch and we were backing Mr. Glover, and before backing him we wanted to see the specifications and terms and conditions of his contract. We did see them and they showed that the dimensions were 3x3x5.

Water came through the Nickerson Ditch from 1888 or 1889, but not continuously. It did in the winter time but not in the dry season. It always

(Testimony of L. Cohn.)

proceeds as far as the spillway of the Bader Mine. There was much more water that came through in the winter than at other times during winter. The ditch would run to its full extent. From 1889 there was a ditch with laterals went in just across to what they call the Magalia Road, which is about two miles or two miles and a half below the Bader Mining property. The water company [141] had some customers which they supplied from the ditch, but how many I don't know, nor do I know the extent of the water they used. I believe it was in 1889 that they extended the ditch down across what they call the head of Dry Creek, and on down the Cherokee or Oroville Road. Afterwards there was a further extension made clear down to the Kunkle Reservoir. I have been down there in Paradise but I don't know whether there are any ranches which take water from the Nickerson Ditch for irrigation down there.

Redirect Examination.

The ditch was built according to the plans and specifications. I paid no particular attention to the water in Little Butte Creek after 1904. I knew there was water in the ditch after that for the simple reason that when I would deliver goods to Mr. McCubbin I passed across the ditch, and right down to what they call the Mineral Slide the water was in the ditch. The water is taken out of Little Butte Creek about two miles above the Mineral Slide Mine and conducted by ditch and flume to the mine. The ditch I refer to is the Mineral Slide Ditch. The

(Testimony of L. Cohn.)

water comes from Little Butte Creek and the fact that water was in the Mineral Slide Ditch would indicate that there was water flowing in Little Butte Creek.

I never took any particular notice of whether the water was flowing in Little Butte Creek between the head-dam of the Nickerson Ditch and the point where the Bader Mining Co. turns its water into Little Butte Creek, either prior or subsequent to 1904. I noticed the water below our head-dam in Little Butte Creek.

The ditch as it was enlarged in 1906 is as near as I know on the same grade as the old Nickerson Ditch because it follows the same line; it may vary a little at different places, but follows the same line.

STIPULATION.

It was thereupon stipulated between counsel for the defendant and for the plaintiff, that the defendant was the owner of the property described and referred to as the Bader Gold Mining [142] property subject to any water rights and ditches, if any existed.

Evidence Introduced by Testimony of George B. Mowry, Recalled by Defendant.

After the beginning of the use of the water in 1906 through the Nickerson Ditch, I did not continue to use the Thompson Flat Ditch. There was no water in the creek, the water having been all diverted away. The flume of the Thompson Flat Ditch all

(Testimony of George B. Mowry.)

rotted away, the ditch filled up, and my head-dam went out entirely later on.

The Bader Gold Mining Company paid all the taxes assessed on the property in the northeast quarter of Section 1, which has been assessed to the Bader Company. The Slocum place is on the Bader Mining Company's property probably 200 yards right down the line of the ditch.

Cross-examination.

The slide that put the Powers Ditch out of commission in 1900 was right where I was sluicing out the ravine working in the mine. The hill slid there, and the end of my ditch went out in this slide. We could bring water from Little Butte right to this slide but it would keep sliding down all the time. This happened in December, 1900. We did not bring water in 1900, after this slide, through the Powers Ditch from Little Butte Creek to the Bader Mine. In 1901 we ran a tunnel through the side of the hill and brought the water down in the Powers Ditch again. We did not fix the ditch up at all after that. We abandoned it. We sluiced the whole hill out getting into the hydraulic property. I don't remember when it was finished finally so as to enable us to carry the water to the tunnel, but I think somewhere in 1901.

After I finished the work on the Powers Ditch I used both that ditch and the Nickerson Ditch. I suppose probably I would have been able to bring the water through the Powers Ditch alone if I wanted to, but I preferred to use the Nickerson

(Testimony of George B. Mowry.)

Ditch on account of getting more pressure. [143]
I don't remember whether I took it all or not. The dam was built right across the creek with the gate and waste way. There was so much water in the summer time in Little Butte Creek at the head of the Powers Ditch that we let some of it go down the creek. At some times there was plenty of water there in the summer, and sometimes there was not. When there was not enough we would take all the water into the ditch and when there was we would let it run over the spillway down into the creek. I could not tell you how many inches of water there was in the summer time at the head of the ditch, for I never measured it. I think the testimony here yesterday that there was between 150 and 130 inches in the summer time was correct. In the Bader Mine I require all I can get when we are hydraulicking. The more water I had the better. When we were sluicing and not hydraulicking I would require from 200 to 500 inches.

“Q. That being so, what would you say with respect to the question I asked you a little while ago as to whether or not in the summer time you took into the Powers Ditch all of the water which was flowing in Little Butte Creek. A. Yes.

Q. What do you say regarding that?

A. What would I say in regard to it?

Q. Yes. (Objection made and overruled.)

A. In what respect?

(Question read by the reporter.)

A. Whether I did take it into the Powers Ditch?

(Testimony of George B. Mowry.)

Q. Yes. You just testified, did you not, that you required 200, or 300, or 400, or 500 inches for use in the Bader Mine?

A. I required it; the more water I had the more dirt I could sluice away.

Q. Very good; we understand each other. Now you said that you did not know whether in summer time you took all of the water flowing [144] in Little Butte Creek at the head of the Powers Ditch, or whether you let some go by. Now, since you agree that there was between 150 and 300 inches in Little Butte Creek at the head of the Powers Ditch in summer time, and you required 300, or 400, or 500, or 600 inches, I ask you why you didn't use it, or whether you did use it?

A. If it was in there I used it.

Q. Was that true of all the time that you had the Powers Ditch while it was capable of being used?

A. Yes, I used it all the time it was capable of being used, if I needed the water at the mine. If I did not, I let it run down the creek, but I always had water running through there so as to keep my flumes in condition."

After I had done the work the Powers Ditch was just as good as it was before. Thereafter I continued to use the Nickerson and Powers Ditches together. I could not say just how much water I took from both the ditches, but it was probably about 500 inches. I probably took 150 inches from the Powers Ditch; that is just a guess; for I never measured it. I aimed to take more from the Nickerson Ditch on

(Testimony of George B. Mowry.)

account of the pipe. The hydraulicking ceased in the latter part of 1904 and up to that time we used water from both ditches. In 1906 when all water was diverted out of the creek, there was no more water to put in the Powers Ditch and [145] I commenced to take all my water out of the Nickerson Ditch. The head-dam at the Nickerson Ditch was rebuilt in 1905 or 1906. I don't know that a new dam was put in there. I think the former dam was left, but repaired. I don't think it was rebuilt, but that it is the same dam as was there. I saw where they had been making improvements, in regard to the wing. Even last winter I think they put a new wing in there. I saw that new work had been done there. I never saw anyone rebuilding or working on the dam up there in 1905 or 1906.

The conversation I had with Mr. Goodwin when I stated I was going to take the water was in San Francisco in 1906, I believe. I cannot fix any more accurately the date. It was after the fire. My conversation with Mr. Goodwin that I testified to in which I protested against the widening of the ditch was before the fire, and at his office on Pine Street. I think that was in 1905,—the latter part of 1905. It was at the time they were working on the ditch up there.

Redirect Examination.

In 1906 when I went up there I saw where there had been more cleats nailed on the top of the dam to stop the water going over, to divert it all down into the ditch. In the summer time when there was

(Testimony of George B. Mowry.)

not water enough we ceased work and did not use the water through the Thompson Flat Ditch. We had no gravel at that time but were washing or trying to get into the gravel. When there was plenty of water we used it continuously. When there was more water in the creek than we could take through our ditch we let it go down, past the head-dam of the ditch. I do not know anything about how long the Snow Ditch continued in use, and when it went out.

I saw the Snow Ditch once. I think it was in 1902 when I was up to Powellton when I saw the ditch where it came and went into Little Butte Creek.
[146]

Recross-examination.

I think the capacity of the Powers Ditch after I had repaired it was 500 inches. We took all the water flowing in Little Butte Creek at the head-dam of the Powers Ditch in the summer time.

I saw Mr. Smith with reference to renting the Nickerson Ditch in December, 1900, at his office in Oroville. No one was present at the conversation except Mr. Smith and myself. I had only one conversation with him on the subject. I was on my way to San Francisco and went in there and made my arrangements with him. It was a verbal arrangement. It was just before the holidays, because I was on my way down here for the holidays. My arrangement was to pay him \$50 for the use of the ditch when I used it, when I was taking the water through it. In the summer time there was not the

(Testimony of George B. Mowry.)

water. I took the water up until probably June when the water went down. When the water was not there to hydraulic with I did not take any water then nor pay for the ditch. I did not think anything at all as to whether the \$50 a month was a steep price to pay for the use of the ditch or not. I knew if I had to buy water from them, 500 inches, the least it would cost me would be \$25 a day, at 5 cents an inch. They raised my rent but I did not kick about it. I sent them a check for it and had no conversation with them at the time. They sent in bills and I sent in checks to them. I did not think it strange when the bill came in the first time for \$75 because the power company will do most anything. I ceased to pay the \$75 a month when I had no further use for the ditch. I sent them a check for the last month and did not use the ditch any more. I then used my own ditch up until they diverted all the water out of the stream. I quit hydraulicking, and then I started and ran another tunnel, and started up in the Davis Hydraulic cut to work, and we ran a small tunnel through there into [147] the Davis hydraulic cut, and we had our water then and we sluiced out there, and started a tunnel there, and then I had that water to do all my washing with, with my own ditch, and I ceased using the Nickerson Ditch then until they diverted the water. Then when they diverted all of the water, then certainly I started to take it out of the ditch. I wanted to recapture my water then.

I was not paying \$50 and \$75 a month for the water. I told Mr. Smith when I got the ditch that

(Testimony of George B. Mowry.)

I was paying rent for the ditch. I never made that claim since that time to any one connected with the water company.

“Q. You received the bills for the water and paid \$50 a month and \$75 a month without protest until you quit paying it, as you have just testified?

A. Yes.”

Redirect Examination.

Between 1900 and 1904 when I was hydraulicking I took water from both ditches and paid the water company first \$50 and later \$75 a month. In the latter part of 1904 I quit hydraulicking. During the year 1905 I used water from the Powers Ditch but no water from the Nickerson Ditch and I paid them no money during that interval. In the meantime, the gate in the Nickerson Ditch and the pipe stayed on the ground. The head-gate, however, was closed down so that the water could not come down my pipe. When they widened the ditch and diverted the water around me, then I started taking water from the ditch again.

There is no time in the year that there is not water flowing in the Nickerson Ditch. It flows all the year round every year, even in years of exceptional drought. There always has been water in the ditch but at times it is very low. I should judge that there are now probably 130 inches of water. [148]

“Mr. CROSS.—Q. The water which flows in the Nickerson Ditch now is the water which formerly flowed down Little Butte Creek prior to their enlarging the ditch? A. Yes.

(Testimony of George B. Mowry.)

Mr. ORRICK.—He could not tell that.”

Prior to this enlargement the water continued to flow down Little Butte Creek during the summer time to the head-gate and I took it through the Powers Ditch. [149]

Mr. CROSS.—With that we will rest our case with the right to call an expert if we find it necessary in respect to the size of the ditch.

The MASTER.—An expert to testify with respect to the size of the ditch?

Mr. CROSS.—Yes, the capacity.

The MASTER.—The capacity is a different thing. Anybody could testify to the size of the ditch. Proceed, Mr. Orrick.

**Evidence Introduced by Testimony of H. D. Gradon,
Called by Plaintiff in Rebuttal.**

I am fifty-seven years old and reside at Oroville and have been employed by the Oro Electric Corporation since 1911. I am a surveyor by profession. My duties have brought me in contact with the Nickerson Ditch of the company. In the year 1913 I made a survey of that ditch. In that year I made measurements in cross-sections of the ditch between the head-dam on Little Butte and the spillway through which the Bader Mining Company has been furnished water by the company.

At station 130, which is about 500 feet above the Bader spillway (the witness here referring to his notes and a profile thereafter put in evidence as Plaintiff's Exhibit No. 3), there was a flume. Its inside measurements were 5.88 feet, and its depth

(Testimony of H. D. Gradon.)

2 feet. At station 142 plus 70 the bottom width of the ditch was 4 feet and the top width from berm to berm was 9.3 feet. By "berm" I mean the outer bank of the ditch. You could not carry water up to the berm for there are places in the ditch that would overflow at low points. It would carry water about 2 feet from the bottom.

At station 156 plus 10 going up the ditch the bottom width was 4 feet and the top width 9 feet and the depth of the [150] water 2.6 feet. At station 177 plus 75 the top width was 8.3 feet, the bottom width 4 feet, and the depth of the water in the center 2.1 feet. At station 197 plus 35 the ditch is level for 3 feet on the bottom, and then there is a very gradual raise. The area is practically the same at this station, with a little difference in shape.

I made this survey on May 15th and 16th, 1913. At that time I calculated the grade of the ditch. The blue-print (afterwards introduced in evidence as Plaintiff's Exhibit), is a blue-print of a profile that I made of the survey. This shows [151] the entire ditch from the head-dam to the crossing of the Paradise Road. The only place that I have calculated the grade is between the Bader spillway and the head-dam. The grade is not uniform, the average grade being $14\frac{1}{2}$ feet to the mile. For a short distance it is as low as 11 feet to the mile, and it figures as high in some places as 18 feet to the mile. After a ditch has been located and built it would not be practical to change the grade. It could be deepened but it would be an impracticable way of doing

(Testimony of H. D. Gradon.)

it in the case of a long ditch. I never heard of a long ditch being altered that way.

I also made some calculations as to the amount of water flowing in the ditch in May. I measured the cross-section of the flume, the area of the water flowing in the flume, and measured off a distance in the flume, 100 feet I think in each case. I then placed floats in the flume and timed the distance that it would pass the upper point and the exact time it passed the lower point, and from this I made a calculation of the quantity of water flowing in the flume, which was all the water flowing in the ditch. By this method we simply get a certain quantity of water flowing at a certain rate past a given point. Of course there is an element of uncertainty in it as there is in all water calculation. This element of uncertainty is that the water flowing in a flume does not travel with equal velocity in all parts of the flume. It would perhaps flow faster in the center than it would at the sides. Engineers, however, in making experiments, have determined that the result of a flowage in a flume or waterway will be within 80 or 90% of the actual volume that you are figuring. In my calculation I took 15%, making it 85%, an average which is generally taken. I found at station 135 that the total amount of water flowing as calculated without any deduction would be 33.51 second-feet, equal to 1,677 miner's inches. Deducting 15% gives me 28.52 second-feet, [152] equal to 1,425 miner's inches. There is a difference among people as to what constitutes a miner's inch. I calculated it ac-

(Testimony of H. D. Gradon.)

cording to my standard, which is the standard that has always been used by the Oro Electric Corporation; that is, that there are 50 inches to the second-foot. That is the system common in Butte County and throughout the State, and I think is a statutory definition in California. The measurement in second-feet is unchangeable. A second-foot of water is a cubic foot of water—the amount of water flowing past a given point in a second. In figuring by second-feet the grade of the ditch is of no particular significance. I measured in the flume, which is a more advantageous place for ascertaining accurately the amount of water in the flume for the reason that there is a uniform cross-section which it is impossible to obtain in a ditch unless the ditch was thoroughly cemented and dried up. In an open ditch the friction is harder to account for, the unevenness making the difference.

In taking these measurements I just took a fair idea of the ditch, the size of the ditch, and its capacity as to whether it was capable of carrying more water. The figures I have just given was the amount of water that was flowing there in May, 1913. I would consider the water flowing at that time the full capacity of the ditch. I would not consider it safe to put any more water in it than was flowing there that day; that is to say, 1425 miner's inches. There was a good flow at that time. I don't think it would be safe to run any more water than was running then. You possibly might run a little more water there, but not safely. The outer berm of the ditch at places was

(Testimony of H. D. Gradon.)

only 9 inches above the surface of the water. If the water was raised any above that it would be liable to break over it any time and probably carry out the ditch for a considerable section. (Thereupon the blue-print profile of the ditch was placed in evidence as Plaintiff's Exhibit 3.) [153]

Referring to Plaintiff's Exhibit 3, the word "spillway" appearing at station 130 is the spillway leading down to the Bader Mine. The word "flume" marked at station 170 is at the Churchman Mine; just a short section of flume in the ditch. The word "flume" near the head-dam represents the flume at that point. These show all the flumes which are in the ditch between the points covered by the profile. There might possibly be a box in some place, but that shows all of any importance. There is a break in the profile at station 120 simply in order to get the profile down to narrow limits.

Cross-examination.

I marked the flume at which I took the measurements with an X. The width of this flume and of the ditch is not shown on the profile. The profile is merely a diagrammatic representation of the ditch as if it were perfectly straight from beginning to end showing a cross-section lengthwise, with the scale exaggerated.

The flume shown on the profile near the head-dam was 5.88 feet in width with a water level of 16 inches on one side and 17 inches on the other. This flume and nearly all flumes are constructed so that side pieces extend above the flume boards. I think this

(Testimony of H. D. Gradon.)

was the case with the flumes on this ditch.

In the flume at station 135 the water was 14 inches deep. In measuring the width of the ditch I measured by taking a level from the top of the berm on the lower side across to the upper side. Correcting my testimony as to station 142 plus 70 I was looking at the wrong place in my note-book. The ditch at that point is 3.55 feet deep, the water depth being 1 foot and a half. Referring to the profile, stations 176, 186, 202 and 204 indicate the points at which the berm was low. At the first places the distance between the berm and the water level measured a foot and in the last places 9 inches to approximately a foot. At station 176 the berm [154] was low for probably 300 feet, and at station 186 for probably 150 feet. There is 200 feet between stations 202 and 204. The portion between station 202 and 204 was built on a side hill, I think.

At station 156 plus 10 the depth of the ditch was 3.9 feet, and the depth of the water 2.2 feet, leaving 1.75 between the top of the water and the berm. At station 177 plus 75 it is 1.6 feet between the surface of the water and the berm.

The flume at station 215 was 5.88 feet wide, the water on one side being 16 inches deep and 17 inches on the other. I did not measure the distance from the floor of the flume to the top of the joists. The profile does not show the depth of the flume accurately. I did not make a measurement of the entire depth of the flume, nor did I make a measurement of the boards that were on the side of the flume at that

(Testimony of H. D. Gradon.)

time. If you wanted to figure the total amount which the flume would carry the height of its sides would be one element in figuring its capacity; that is, the flume as distinguished from the ditch.

At station 197 plus 35 the width of the ditch is 4 feet at the bottom, the water flowing at a depth of 1.8 feet, the ditch at that point being 3.95 feet from the bottom of the ditch to the top of the berm. At station 202 plus, the ditch was 4 feet on the bottom with a depth of water $1\frac{1}{2}$ feet, and a distance from the bottom of the ditch to the top of the berm of 3.5 feet, and the distance from berm to berm of 9 feet. At station 197 plus 35 the width from berm to berm was 9 feet. At station 177 plus 75 the width of the ditch on the bottom was 4 feet, and the depth of the water 1.6 feet, the distance from the bottom of the ditch to the berm 3.4 feet, and the distance from berm to berm 8.3 feet.

I made measurements also at the surface of the water. The width of the surface of the water at the various stations was as [155] follows: At station 215, 5.88 feet; at station 197 plus 35, 6.4 feet; at station 202 plus 25 plus, $6\frac{1}{2}$ feet; and at station 177 plus 75, 5.8 feet.

At station 166 plus 10 the width at the bottom of the ditch was 4 feet; the depth of the water in the center 2.1 feet; the height from the bottom of the ditch to the berm 3.9 feet; the width from berm to berm 9 feet, and the width of the surface of the water 5.7 feet.

At station 142 plus 70 the width of the ditch at the bottom was 4 feet; the depth of the water 1.6 feet; the distance from the bottom of the ditch to a line

(Testimony of H. D. Gradon.)

from berm to berm $31\frac{1}{2}$ feet, the distance from berm to berm 9.3 feet, and the width of the surface of the water 5.7 feet.

At station 135, which was the flume, it was 5.88 feet wide, with a depth of water 14 inches. In this connection I desire to correct the testimony given this morning when I stated I believed that this flume was 2 feet deep. The depth is 2 feet 10 inches; that is to say, the side-boards measured 2 feet 10 inches. I think there is in this flume plenty of space to put on another board. I never saw a flume but what there was a foot or a foot and a half above the top board to the cross-brace. They generally construct them in that way, so that they will have room to repair them.

At station 130 plus 60 the width of the ditch across the top from berm to berm is 9.3 feet; at the bottom 4 feet; the depth of the water 1.6 feet; the width of the surface of the water 6 feet, and the distance from the bottom to a line drawn from berm to berm 3.8 feet.

The foregoing represents all the measurements taken by me above the spillway. I took several measurements below, probably a dozen. The exact station of the Bader spillway is 130 plus 41. Referring to my field-notes, the first column is headed "STA," under which appears the number of the station. The first station begins [156] on the Magalia Road. Under the column headed "S" appears the place of the level, what we call sometimes a back sight. Under the column "H I" is given the height of the instrument from the assumed elevation, or the base

(Testimony of H. D. Gradon.)

you start from; your datum line. I assume an elevation at the Magalia Road of 100. Under the column headed "Elevation" is my height of instrument column.

The distance between stations is 100 feet, and we took every second station. The letters "T P" under the station column mean turning point.

(At this point the readings and figures from which the witness has been giving his testimony beginning on the page of his field-notes, showing station No. 128 and from thence on to the page showing the head-gate of the Nickerson Ditch, was introduced in evidence as Plaintiff's Exhibit 4.

WITNESS.—(Continuing.) The abbreviations and symbols used in the back are the ones ordinarily used by a surveyor and any engineer can understand them, though there might be a little confusion about the three different readings, the berm, the water level, and the bottom of the ditch. I found the elevation at the top of the head-dam at Little Butte Creek as 169.88, and the elevation of the bottom of the flume under the head-gate as 160.13. The top of the dam is about 10 feet higher than the flume leading into the ditch. I have no readings on the weir at all. I do not know anything about the reconstruction of that dam.

I took no other measurements of the water flowing in the Nickerson Ditch than that just given. I think I took some measurements on the Powers Ditch since 1911. I call to mind that I measured at one time the flume which they call the Retson Flume. I know

(Testimony of H. D. Gradon.)

where the Powers Ditch comes out of Little Butte Creek. It is located about 4 or 5 or 600 feet below the Nickerson Ditch. [157] At the time I measured it in 1911 it was in bad condition.

The water that flows through the Nickerson Ditch is diverted at different points by irrigators taken down to Paradise, part of it, and the balance to the Kunkle Reservoir. Two ditches—the Nickerson and the Miocene—lead into Kunkle Reservoir. I have never measured the Miocene Ditch, but would say that it is considerably larger than the Nickerson Ditch.

I consider that the Nickerson Ditch was flowing pretty full in May when I was there. I would not call it a period of extreme high water. I suppose there was lots of times that it flows higher.

The Nickerson Ditch is approximately the same size from the head-gate to its mouth. Of course, owing to the character of the country it varies at different places, having different depths. In some places where it goes through it is 8 or 10 feet deep on both sides, but there are no such places above the the Mowry spillway. The low places on the berm that I testified to were on the side hill. As to the exact character of the country on either side of the ditch I could not testify. When I said I thought it would not be safe to flow more water in the ditch than was going through there in May, 1913, I meant that the outer berm of the ditch would probably give way if a much increased depth of water was put in. As a rule, the top of the lowest place of the berm was

(Testimony of H. D. Gradon.)

about a foot and a half or two feet above the surface of the water, as it was then flowing. If the water was raised one foot in the ditch, providing that it could have flowed a foot more, it probably would come pretty near doubling the quantity of water. I don't think the ditch could carry any more water than it was carrying when it was running one and one-half feet deep and be safe. If more water was carried it would be liable to give way at those low places. I would not consider it safe to carry water to within 3 or 4 inches of the top of the bank.

I did not make any measurements as to the thickness of the walls at the point where the berm was the lowest. That would [158] have considerable to do with the safety in flowing it. I am not prepared to say whether it was a wide or a narrow wall. There is a path all along the ditch, a foot-path. The berm was the lowest at station 203. At that point the top of the berm was .7 of a foot above the water. There was no indication that the berm was breaking away. The height of the berm above the water gradually increased from this station to station 204 where it was 1.2 feet. At 202 the distance is .7 of a foot, and also at 203. At 200 it was 1.5 feet at 206 it was 1.8 feet. The distance along the ditch where the berm was .7 of a foot above the water, was about 100 feet. I think that is the lowest point of the berm between the head-gate and Mowry's.

While I could not tell without making a calculation, I think the Nickerson Ditch as measured by me in 1913, would carry approximately twice as much water

(Testimony of H. D. Gradon.)

as a ditch 3 feet deep, 3 feet wide, at the bottom, and 5 feet at the top. If the water flowed up to within 3 or 4 inches of the top of the Nickerson Ditch it would carry at least one-third more water than the present ditch, which would make it somewhere between 2,000 and 2,400 inches.

Redirect Examination.

It is customary among surveyors to indicate, when there is a low measurement, that fact, and I pursued the same method that is ordinarily employed by surveyors. No one suggested to me whether it would be to the interests of the water company to get a big capacity in the ditch or a small capacity. I had no idea when I made my measurements in what way the interests of the company tended. In making the measurements on the ditch I tried to pick out average measurements, trying to give exactly what there was on the ground. In measuring the line, it is possible that the rod we ran across the ditch to make the measurements from was not clear down to the top of the berm. Some places the berm might extend a [159] foot or two above it, and the rod was not long enough to reach it. It is not below the measure I have given it. The outside berm of the ditch might possibly run much higher than what these figures would show it to run; that is, where there was plenty of ditch, where the cut was pretty big. The length of the rod was 7 feet, but [160] I extended it to 9 feet. It could be extended to 12 feet, but if extended within 9 feet it becomes limber, and is not favorable to measure from.

(Testimony of H. D. Gradon.)

I did not see any evidence of recent blasting on the ditch. I don't remember seeing any place along there which would indicate there had been any blasting done. There was some evidence below the Bader property.

Recross-examination.

The evidence of blasting that I refer to below the Bader property was a mile down. There the rocks looked newly broken. If the ditch had been enlarged in 1905, I have an idea you probably would see more or less evidence of it. You could see it at different places in there, but particularly along the Butte County Railroad where it apparently looked more recent than anywhere else. I don't think there is any evidence on the ground to indicate an enlargement. I did not make any special examination as to whether you could find any such evidence or not; I did not pay any attention to that.

If you extend the rod I used over 9 feet it would bend down so that it would be difficult to get a level line across to measure from. It is possible in giving the measurements that the berm was higher than indicated by the measurements where the berm runs high.

Evidence Introduced by Testimony of William Durbrow, Called by Plaintiff.

I am an engineer by profession, a graduate of the State University, and am employed by the Oro Electric Corporation. I was formerly employed by the Oro Water, Light & Power Co. and the Oroville Water Co., the predecessors of the present company.

(Testimony of William Durbrow.)

I commenced my employment with the Oroville Water Company in May, 1903. At that time I was the manager of the company, and later [161] on became secretary and manager, residing at Oroville.

In 1903 the plant of the Oroville Water Company consisted of ditches heading in the west branch of the Feather River and in Little Butte Creek, with the distributing systems, including pipe systems in Oroville and Thermalito, and the ditch distributing system in Paradise. The Nickerson Ditch heads just below Magalia, to the west of Magalia, in Little Butte Creek, and extends along the east bank of the creek going down as far at that time as the Chico and Magalia Road. This road is a little below Wagstaff's, probably 2 miles by the ditch. The main Nickerson Ditch does not go through Paradise. The water was carried by the Nickerson Ditch to certain points on the ridge across Paradise, and distributed by smaller ditches. The water for the Paradise people was taken down by the Nickerson Ditch and then transferred either into a portion of the old Powers Ditch and carried down the old Powers Ditch and distributed around Paradise. This was a portion of the Powers Ditch below the head-dam, but not connected with it. In April, 1903, when I was there, a large portion between where we had the Powers Ditch and the head-dam, was unused. The flumes were down and the ditch buried up. I don't know about the extreme head.

At the time I went there there, was a head-dam on Little Butte Creek at the Nickerson Ditch. During

(Testimony of William Durbrow.)

my stay at Oroville, which was from April, 1903, to May 1st, 1908, I was on Little Butte Creek many times at different times of the year. No water past the head-dam in Little Butte Creek at the Nickerson Ditch intake at low stage. During high water the water would go over the weir of the dam. The dam was never rebuilt in my time. There might have been some little repair work done, but no material change in the dam at all, merely maintenance work. During the irrigating season, which would commence possibly some time in May, possibly not until the first of [162] June, and would extend through, depending upon the season, possibly to the first of November, no water passed the head-dam of the Nickerson Ditch. The company diverted all the water from Little Butte Creek down the Nickerson Ditch except such water as passed over the weir in times of exceptionally high water.

We sold the water that went into the Nickerson Ditch to irrigators and various mines, and anybody that had the price. The Bader Mine was one of the water company's customers. The payment for the water was mostly made by check, and monthly. The bills that we sent them specified on their face that they were for water. When I went up there in April, 1903, the Bader Company were paying \$50 a month during the months when they used the water, during the winter. This was a flat charge. Beginning in 1903 the amount was raised to \$75 a month, and they continued to pay that rate during 1903 and 4. During all the times I was up there the

(Testimony of William Durbrow.)

gates leading into the Bader spillway were regulated according to my orders to the ditch-tender, excepting in the winter time when possibly we would not have a ditch-tender on there, and would let the Bader people open and shut the gate as they chose. The money received from the ditch was not sufficient to pay for a ditch-tender, and they would have to handle the gates themselves.

The water would not be used by the irrigators in the winter time, so it was arranged that the Bader people might have it from the Nickerson Ditch in the winter time, paying \$75 a month for it. In addition to paying the amount of money,—\$50 and then \$75,—they had to take care of the ditch during the season in which they used it, to keep it clean. In other words, the \$50 or \$75 was the net charge. I think they paid us for water the last time in 1906. They actually paid money in 1905, in which year they took water. [163]

Q. Did they take any water in 1905?

A. They took water in 1905.

Q. Did they take the usual amount at \$75 a month?

A. Not all through 1905; not all through the season. That would be the winter of 1905-6. As I remember, they only paid us \$75 a month during that 1905-6 season.

THE WITNESS. — (Continuing.) During the rest of the time I was up there until I left in 1908, the Bader Company did not use any water. Neither Mr. Mowry nor anyone else ever claimed to me that the Bader Company was paying this \$75 a month

(Testimony of William Durbrow.)

for the use of the Nickerson Ditch. I never heard the claim made that the Bader Company was paying \$75 for the use of the Nickerson Ditch before I heard Mr. Mowry state it on the witness stand here yesterday.

If any water was taken from the ditch after 1906 by the Bader people, it was without my knowledge. We kept a ditch-tender regularly there from about May or June until the end of the irrigating season, that being the only time we kept a ditch-tender regularly. During my time there a man by the name of Murphy was the ditch-tender from 1903 to 1906, inclusive, and a man named Merrill from then on to the end of my time. Murphy is dead. Mr. Merrill is living, but is in the southern part of the State, I believe. I am positive that during all of the period I was up there in Oroville the company manipulated as it pleased the spillway on the Nickerson Ditch from which the Bader people had taken water. Mr. Smith was not connected with the Oroville Water Company when I went to Oroville. I am informed that he is dead.

During the time that I was up there at Oroville I don't remember any time when the Bader people took water in the summer time. Q. If they took any water in the summer time, did they take it surreptitiously? A. They could not do so without my [164] knowledge. We needed every drop of water in the ditch to serve our irrigators. In fact, they were always kicking because they didn't have water enough. If there was a drop of water missing from

(Testimony of William Durbrow.)

the ditch we would send a ditch-tender up immediately to find out the reason why. We could immediately tell below a few hours after if any of the gates were tampered with from the difference in the head of the stream.

There was no enlargement of the upper portion of the Nickerson Ditch in 1905 or 6. In 1907 the ditch was extended down to Knukle Reservoir. The Nickerson Ditch originally went on down to the Magalia-Oroville Road, but there was a portion on the lower end that was in use in 1903. In 1907 we started some place below [165] the spillway of the Bader mine to enlarge the ditch to as large a capacity as it was above. Even that was only a matter of cleaning out to the original size. The old ditch had been filled in by years of limited use and it was only a matter of putting it back into shape again and extending it to the Kunkle Reservoir. In 1905 the Oroville Water Company was consolidated into the Oro Water, Light & Power Company and the purpose in extending the Nickerson Ditch to the Kunkle Reservoir was to take water as an auxiliary supply from Little Butte for use at our power plant during the periods of high water. At that time, I might explain, the mines had ceased buying water from us up there because apparently they had all shut down and therefore the water was available to be used down below. Some of the work of extending the ditch was done in 1906; possibly very little in 1905.

Q. Are you perfectly positive that the ditch above the Bader spillway was not enlarged at any time to your knowledge?

(Testimony of William Durbrow.)

A. There was no material enlargement; it was a case of cleaning out; we cleaned the ditch out and cleaned it out very thoroughly.

Q. You say there was no material enlargement. Do I understand that the capacity of the ditch was at all increased while you were up there? A. Well, a ditch that is dirty will not carry the amount of water that a ditch that is clean will.

Q. Certainly. A. The ditch as finally cleaned out, of course, would carry more water than a ditch that is dirty would.

Q. I understand that. A. We cleaned it out, and I don't think that increased it beyond what it originally was intended to carry, excepting that a ditch as it grows older with successive cleanings, it is somewhat enlarged, you are raising the banks always by throwing the material that has come into the ditch out onto the banks, and always on the upper bank of the ditch you are constantly [166] sloughing off, and that is thrown off, so your ditch naturally enlarges, a little.

Q. Something has been said with respect to the measurements across the ditch as compared with those given by Mr. North when the ditch was constructed. Mr. North testified, I believe, that the width then was 5 feet. What can you say, if anything, with respect to the tendency of the banks of a ditch to fall back in the course of time? A. In digging a new ditch along a hillside, you are cutting into the natural slope of a hill; in other words, you are cutting off a bench there and making an unnatural

(Testimony of William Durbrow.)

slope for that upper bank of your ditch. Now, as time goes on, that tends to slough off, getting back to the natural slope, and naturally the top of your ditch continuously increases in size, until that upper bank has become vegetative and has become settled to a point where it won't move any more, which it takes a number of years to do.

I have made a computation as to the carrying capacity of a ditch 3x3x5 with a grade of 9.61 feet to a mile. Assuming when they say a ditch 3x3x5 they mean a ditch cut so that it would carry 3 feet of water it would carry 1,740 miner's inches. In other words, if you wanted a ditch of 1,740 miner's inches you would have built a ditch that size. I used Cutter's formula in making that computation, which is an improved formula for calculating the flow of water in ditches. The question as to the amount of water a ditch will carry is a matter depending largely upon the judgment of the person inspecting the ditch. One man operating a ditch, told to carry its limit, might carry a little bit higher water level than another man, according to whether he was a careful man or a man willing to take a little risk.

Q. Now, Mr. Durbrow, assuming that Mr. North and the other gentlemen on the other side who testified, stated that the dimensions of this [167] ditch were as I have stated, assuming that those were correct, and bearing in mind the fact that you say such a ditch would carry about 1,740 miner's inches, can you give us any explanation of why today appar-

(Testimony of William Durbrow.)

ently the ditch's capacity is somewhere around 1,425; there seems to be a shrinkage? A. Well, probably the outer banks of the ditch are lower than when they were first constructed, settled somewhat, and for that reason they are not carrying as high a water level, although the ditch may be and is probably somewhat wider than when first constructed.

Q. Due to the fact you have already mentioned about the banks naturally tending to fall back?

A. Yes, and due to successive cleanings.

The capacity of the Nickerson Ditch during the period I was there from 1903 to 1908, was substantially as stated by Mr. Gradon. During the periods when the brush or rubbish would be permitted to accumulate in the ditch, its carrying capacity would correspondingly diminish. The water that was carried in the Nickerson Ditch in the winter time was practically to its full capacity. There was ordinarily plenty of water in Little Butte Creek in the winter time. Sometimes in between storms the water would run down so there would not be enough for the ditch. I have never known a time in the summer time that the Nickerson Ditch did not take all of the water of Little Butte Creek. So long as I have known the ditch it has always taken the full flow of the creek at the head-dam in summer. In fact, the ditch was many times larger than necessary to do that.

Cross-examination.

I am now engaged with the Oro Electric Corporation. I don't remember how many men we had en-

(Testimony of William Durbrow.)

gaged in cleaning out the ditch in 1905 and 1906, but there were quite a number. I had direct [168] control of the camp of men as manager of the company, and work was done under my direction. I was there at times to see the work being done. Murphy had charge of the work. Before I sent him up I did not give him any plans or specifications with which to work by.

“Q. Did he clean out the ditch from the Bader property to the head-gate at the same time and under the same instructions that he cleaned it out below the Bader Mine?

A. Yes, I think he did; I think he cleaned it all, that whole ditch was cleaned out about the same time.

Q. How far below the Bader Mine did he clean out the ditch?

A. I think as far as the ditch was then being operated.

Q. That was down to the point where it turned water into the Thompson Flat Ditch, was it not?

A. I think below that.

Q. How far below the Bader Mine in miles, along the ditch? A. About 3 miles.

Q. The ditch, before he went up to clean it out, was about the same size below the Bader Mine as it was above the Bader Mine? A. No.

Q. Did he make it all the same size? A. Approximately so, I should say.

Q. Did he do the work all under the same plans and specifications, the same instructions? A. There were no plans and specifications. The idea was to

(Testimony of William Durbrow.)

make the ditch below the Bader Mine big enough to carry the water that the ditch above the Bader Mine would carry.

Q. What did the ditch below the Bader Mine carry at that time, before it was cleaned out? A. Well, it was only necessary to carry what water was used there in irrigating, probably not more than a couple of hundred inches at the outside.

Q. What would it carry above the Bader Mine, before that time, [169] before 1905 or 1906?

A. Well, that would depend upon how well the ditch was cleaned.

Q. I say, before it was cleaned? A. You mean in the dirty condition?

Q. In the condition it was before he cleaned it in 1905 or 1906?

A. I don't know. That would be a pure guess.

Q. How many times between 1903, when you took control, did you visit the ditch along the Bader property, and between there and the head-gate, between that time and 1905, when you went up to clean it out?

A. I don't know how many times, quite a number of times.

Q. Several times a year? A. Yes, several times a year.

Q. You have no idea as to the capacity of that ditch prior to the time you cleaned it out in 1905?

A. No, I would not want to hazard a guess as to what it was; it was probably under its capacity by several hundred inches, due to dirty condition.

(Testimony of William Durbrow.)

Q. What would you estimate as its capacity in its cleaned condition? A. Its capacity in cleaned condition would be somewhere around that which has been given here, 1,400 or 1,500 or 1,600 inches.

Q. You don't know its capacity in its dirty condition? A. No, that depends upon how dirty it is.

Q. You know how dirty it was. Didn't you send a man up there to clean it out? A. Yes, the ditch was very dirty at that time, a lot of alders had grown in the ditch, and it was very dirty, and it needed a thorough cleaning.

Q. Probably carried about half the water that it carried since you cleaned it out: Is that what you want us to understand?

A. I do not want to make that one-half; it might have been half, but I should say it was a good deal more than half. [170]

Q. What was the purpose of cleaning out the ditch from the Bader Mine up, when you had to enlarge it below to carry the water which was carried through the Nickerson Ditch at that time?

A. Well, we enlarged the ditch below to carry what the Nickerson Ditch would carry above when it was cleaned.

Q. And at that time you began to divert the water into the Kunkle Reservoir for power purposes, did you not?

A. Not right at that time; we were getting ready to do that.

Q. That is why you were cleaning out the ditch?

A. Yes."

(Testimony of William Durbrow.)

I never made any measurements of the water in Little Butte Creek prior to cleaning out the ditch and building the reservoir, and I have never made any measurement of the water flowing in the Nickerson Ditch since that time. I don't recall how many men were engaged in cleaning out the ditch at that time, but I would say we had 25 or 30 men there. I think they were Chinese. When I testified that the Powers Ditch was in a dilapidated condition I do not want to be understood as stating that that applied to the portion of the ditch between the Bader Mine and its head-gate.

There was no change made in the head-dam of the Nickerson Ditch between the years 1903 and 1908. There was always some maintenance work going on, replacing rotten timber and the like. I do not remember the dimensions of the dam except that the crest was about forty feet long.

I was with the Oroville Water Company at Oroville from 1903 to 1908. From 1908 to 1910 I was in San Francisco for the same company. In 1910 and 1911 I was not connected with the company but was contracting for myself. Since 1911 I have been with the company at San Francisco. Since 1911 I have been engineer for the company, for the last year or two engaged mostly in dredging. [171] The company has dredgers. Four of them are supplied partially by power developed at Kunkle Reservoir and one not at all. The company is engaged partly in supplying power to its own dredgers, and partly in selling power to the public. The reservoir

(Testimony of William Durbrow.)

is merely a balancing reservoir, in case of accident to the ditches, or in case of overloading the plants to carry them for a short time. Probably not over one-fourth, possibly one-third, of the power manufactured by the company is used for this purpose.

The company is divided into two departments,—the dredging department and the power and water department. In the power and water department the general maintenance work and operation is handled by Mr. Davis, who is an engineer. He has been engineer in that department since 1908. I do not remember making any report in respect to the capacity of the Nickerson Ditch nor do I know of any report having been made. I do not know of a report having been made to the Water Conservation Commission. I don't know of any report being made to the United States Forest Commission.

When I went into the company in 1903 I did not have a copy of the plans and specifications of the ditch as originally built in 1888. When I testified yesterday that the ditch was cleaned out only to the capacity that it was originally intended to carry, I meant that you can readily see what was the original size of the ditch approximately, from its appearance; you can tell whether you are going to enlarge a ditch or whether you are going to clean it out merely from the appearance of it; the rock walls that are there, and the rock cuts that are made, and the things that are permanent in the ditch. Every time a ditch is cleaned there is something taken out. If there is an abutting rock or something it might be blasted

(Testimony of William Durbrow.)

off or wedged off or any little inconsistency in the bottom of the ditch is cleaned up. I do not doubt every time a ditch is cleaned there is some improvement made in it, some enlargement at that particular point which does not [172] mean enlargement of the ditch at all as a ditch. The soil through which the ditch runs is variable. There is some little rock towards the upper portion, and then you come through into earth country. I do not think in cleaning out in 1905 that any great amount of rock was removed. I am only giving you my recollection on that, that there was no orders given by me and I was the only one who did give orders to enlarge that ditch. The idea was to make a thorough cleaning and improve the ditch, as I have said.

“Q. Now, upon that idea, theory—you have testified that the ditch was not enlarged; is that the idea?

A. Not materially enlarged.

Q. What do you mean by materially?

A. Just as I have explained, here, before, that every time you do any work on a ditch you do some little improvement work, you knock off an abutting rock, you improve it somewhat, and it might mean that possibly you would carry a few more inches at the end of that cleaning than you did at the end of the previous cleaning.”

It is not the custom to have a ditch altogether uniform. Widening a ditch from 3 feet to 4 feet would be a material change if it were done uniformly throughout. My knowledge of the present ditch was secured from Mr. Gradon. I have not measured the

(Testimony of William Durbrow.)

ditch. The only information that I have would be from the survey made for that purpose. I have been over the ditch a great many times. Probably when the work was being done I would go down to the ditch and measure it and see how deep it was, but I don't remember any specific time. I don't doubt but that there were places in the ditch where we took the dirt out that looked like the original earth. I don't remember whether we used any blasting powder between the Bader Mining Company's property and the head-gate, but we probably did. We used it for bulldozing any rocks in the ditch or breaking off abutting points. Breaking off abutting points is a certain improvement of the ditch. [173]

I don't recollect any cleaning of the Nickerson Ditch through the Bader land north prior to 1905 or 1906. That is, I don't recollect the actual cleaning. I would be pretty positive that some work was done each year in cleaning.

The company does not have more water than it needs at Kunkle Reservoir. We do not need any more water at the Kunkle Reservoir if the Miocene Ditch is running full. This ditch is supposed to run full the year round, and has a capacity of approximately 3,000 inches. You can run through 4 or 5,000 inches at the plant at Kunkle Reservoir, a great deal more than runs through the Miocene Ditch. The pipe-line in Kunkle Reservoir was designed to carry probably 60 second-feet, as we generally used all the water up to 4,000 inches in the pipe-line; probably at peak load 4 or 5,000 inches. We can only get out

(Testimony of William Durbrow.)

of Little Butte Creek what the upper part of the Nickerson Ditch carries. As the ditch comes down it picks up a great deal more in its travels. It increases in size as it gets further away from its head and crosses several ravines and in the winter time these ravines make quite a little water, and it could be picked up in the ditch and brought down to supply the plant temporarily while some break has occurred in the other ditch. We do not depend upon these ravines for water as much as from Little Butte Creek. The more water we can obtain the better. Of course the more water we can put into a reservoir the higher load we can carry in the plant on our machines. In the winter time if we carried the full capacity of the Nickerson Ditch it might at times be wasted. I doubt if it would, ordinarily, during the winter. We could carry an overload on our plant. The water we have been getting down the Nickerson Ditch has run into the Kunkle Reservoir. I don't know whether it has been running over the spillways from the reservoir in the winter time for I [174] have not been familiar with it for the last five or six years. I have seen the spillways run over in the winter time when I was there. I have never seen them overflow in the summer time unless the plant would shut down.

In the summer time the head-gate of the Nickerson Ditch was left wide open but not in the winter time. In the winter time if you get a heavy storm there would be enough water to go into the ditch to wash it out. In the summer time the ditch took all the

(Testimony of William Durbrow.)

water flowing in Little Butte Creek.

The Nickerson Ditch and its extension built in 1907 extends to the Kunkle Reservoir. Prior to 1907 we did not use the water through the Nickerson Ditch for power purposes, but sold it, whatever call there was for it. In 1903 we sold the water to the irrigators, some thirty or forty of them. They took the full minimum flow in the creek, paying I think at the rate of 10¢ an inch. I do not remember the mines to whom we were selling water in 1903. We sold to the Bader Mine but I don't remember the amount. During the years I was there between 1903 and 1908 we sold water various years to different people along the ditch, but just what this was and just who the people were I don't remember.

I do not know of any mines that we were selling water to in 1903 or 1904 or 1905 or 1906. The Bader people were not the only people who were paying a flat rate. The people who used the water in their mines if there was any mining, and there was some little mining in those years, were not continuous enough for us to afford to put in a measuring-box and if we did sell any water we undoubtedly sold it to them at a flat rate.

I remember of my own knowledge of selling water to the Bader Mine in 1903. I sent them the bills and had some correspondence with Mr. Mowry but [175] I have been unable to find it. The last we sold to the Bader Mine was in 1906. The last bill was rendered them in April, 1906. It was probably about the same time that we completed cleaning the

(Testimony of William Durbrow.)

ditch. I don't think that Mr. Mowry took any water out of the ditch after April, 1906, but I think I would know if he did, but I am not willing to swear positively that he did not take any water out of the ditch during that period.

In speaking of the upper portion of the ditch I mean that portion extending somewhere below the Bader Mine spillway, the water was used down to the Bader Mine Spillway, and that part of the ditch was kept in pretty good shape. How far below there we had to start to wash the ditch and to make a more full ditch, a larger ditch, I would not want to say. It was somewhere around that point. From there down we widened the ditch as compared to what it was when we started to work on it. In other words, it had filled up. I don't know whether we widened it beyond its former width. We endeavored to conform it to the size of the ditch above the Bader spillway. Above the spillway the ditch had been kept in fairly good shape, except for some willows grown up and dirt filled in. It had been out through rock in this portion, and you could see what the shape was. My testimony to the effect that we did not materially widen the ditch is strengthened by the rock cuts. There was no deepening done in the ditch. We might have cut off a hump on the bottom in some particular places. I would not say we did not blast out something. The dirt that we took out we piled up on the lower bank.

The ditch from Mowry's spillway down towards Paradise in 1903 was merely an irrigation ditch.

(Testimony of William Durbrow.)

It was in poor condition and had been allowed to fill up. I do not know about the capacity it was, only that it was enough to carry the minimum flow [176] of Little Butte Creek in the summer time. Every year we took the full amount of Little Butte Creek and took it down and sold it to these irrigators; therefore the ditch must have been big enough to carry that. The same amount flows through the lower portion of the ditch as flowed from the head-gate down to the Mowry spillway.

Q. Why did the water flowing through the ditch from the spillway to the head-gate keep it in better condition than below the spillway?

A. Because in the winter time we used the ditch from the head-gate down to the spillway to the Bader Mine, and we did not use it below. In other words, we used a large head of water in there. We took all the ditch would hold from the head-gate down to the Bader Mine spillway, to sell to the Bader Mine. The Bader Mine used the water only in the winter time; during the time we had it to spare. All the water that was taken out of Little Butte Creek in the summer time went practically the full length of the Nickerson Ditch unless some was sold to irrigators before it got to the ditch. In the winter time we took all the ditch would hold from the head-gate down to the Bader Mine spillway to sell to the Bader Mine. All the water that was taken out of Little Creek in the summer time went practically the full length of the Nickerson Ditch unless some was sold to irrigators before it got to the

(Testimony of William Durbrow.)

ditch. In the winter time we took all the ditch would hold from the head-gate down to the Bader Mine spillway to sell to the Bader Mine.

We cleaned out the ditch every year. I remember others who received flat rates. Sometimes the ditch-tender would collect the money and merely send the money down. We sold water for mining purposes only during the winter time. After 1905 and 1906, the mining business along Little Butte Creek had gone to the bad, and there were no miners coming to us asking us for water at that time. If the Bader Mine had used water out of the Nickerson [177] Ditch and we had found it out, we would have sent a bill for it, or shut the gate down. I will swear that it was without my knowledge if the Bader Mine used any water from the Nickerson Ditch that they did not pay for. I think I would have known if they had used any, for it would have been reported to me by the ditch-tender. The ditch-tender never made a report to me that they were using the water. I don't remember ever telling Merrill, the ditch-tender, that the Bader Mine was taking water out of the ditch, or for him to shut down the gate. I don't know how many men we used in the years from 1903 to 1906, but they were not many. Sometimes the ditch-tender would get two or three men and then some work he would do himself. He would merely clean out in the spring the dirt that had been thrown in there from the rains and snow during the winter. We put 50 or 60 men to clean the ditch in 1905 and 1906 because at that time we wanted to get

(Testimony of William Durbrow.)

the thing in shape to carry the water through to Kunkle Reservoir. The ditch had become more important to us then from the fact that we were going to extend it on down and we wanted to put it back into complete shape again. The ditch does not carry all the winter flow at the present time. I cannot say how much more it takes out of the Creek than it did before that time. It would take out more after it was cleaned than it did before it was cleaned, most decidedly.

We used the water in the winter time only for mining purposes. In most years the only time we had a ditch-tender there was in the summer time. I think we had a ditch-tender there in the winter time of 1906 and 1907. At other times during the winter the ditch-tender would go over there every so often and look after the ditch, though we did not have a regular ditch-tender on. I don't know exactly what he would do but he would probably merely go to the head-dam and see that everything was in shape. He might go down the ditch if he thought anything was wrong. If the Bader Mine used water after 1907 out of the Nickerson Ditch and while I [178] was there it was without my knowledge. I think I would have known it if they had done so, for it would have been reported to me by the ditch-tender. No ditch tender ever made a report that they were using the water. I do not remember that Mr. Merrill, who was the ditch-tender in 1907, ever made a report to me that the Bader Mine was taking water out of the ditch.

(Testimony of William Durbrow.)

When we cleaned the ditch out we renewed all the flumes. I think the old flumes were 5-foot flumes; they might have been 4, but I think they were 5. Undoubtedly I made some measurements of them but I have no recollection just what they were. The reason that we put in larger flumes was the possibility that later we would bring in some more water in Little Butte, and while we were renewing them we put in standard 6-foot flumes. A 6-foot flume on the grade of that ditch would carry probably 4,000 inches if the sides were high.

When I stated yesterday that a ditch 3x3x5 would carry 1740 miner's inches at a grade of 9.61 feet, I assumed that those figures meant that the water was 3 feet deep. A ditch 4x4x9, figured the same way and on the same grade, would carry probably more than twice as much water. A ditch 3x3x5 that has been built for 8 or 10 years ought to carry more water than when originally built, if properly taken care of. If you do not allow your banks to settle on you and get low, and you keep on piling your dirt up and widening it—if in cleaning out you take out any little points that cause an obstruction to the flow, you would increase your flow rather than diminish it.

“Q. Now, the ditch between the spillway and the head-dam was kept up, was it not, during those years?

A. Between what years?

Q. 1898 and 1906?

A. I don't know. I don't think it was kept up.

(Testimony of William Durbrow.)

Q. Between 1903 and 1906?

A. 1905 was when we cleaned it out; 1903 and 1904 it was not kept in very good shape. [179]

Q. When you cleaned it out, you did widen it some, didn't you?

A. I have testified it was not the intention to widen that ditch.

Q. I say, did you do it? A. Not materially.

Q. Did you ever make any observation as to its width at that time?

A. I don't remember actually measuring it; no. There is no question the ditch carried more water after it was cleaned out than before it was cleaned out; it was a bigger ditch after it was cleaned out than before cleaned out, by the amount that was thrown out."

The difference between the elevation of the Nickerson Ditch at its head and the top of the weir in the dam is about 3 or 4 feet, I think. We did some work on the dam in 1905 and 1906, merely renewing some rotten sticks around the head-gate. I am quite positive that we did not increase the size of the head-gate. The increase in the size of the flumes below the head-gate was merely a matter looking forward with the idea possibly of making the ditch a larger ditch. We never followed that up. I raised the rate of the Bader Mining Company in 1903 from \$50 a month to \$75 a month. Mr. Goodwin, the president of the water company, told me when I took charge that we were selling water to the Bader Mining Company. We talked over the system quite

(Testimony of William Durbrow.)

generally, everything, and what these different ditches were doing, and what was to be done with them.

The Bader Mine was the principal customer of the Nickerson Ditch. They were not a large customer. They were the only customer during the winter time at times when we were not selling any other water to any other time. We never rented the ditch to anybody, or a portion of it.

In increasing the capacity of this ditch yesterday I used Cutter's formula. I took for the coefficient of roughness, commonly called "M" in the formula, I took .025. If the figure 9 [180] was substituted in the figures 3x3x5 for the ditch, with the same grade, I think the capacity of the ditch would be increased approximately 25 or 30%.

Redirect Examination.

The water after it leaves Kunkle Reservoir goes through one plant known as No. 2 plant, or the Lime Saddle Plant, and then [181] the water is taken directly from the wheels of that plant, and conducted 10 miles and dropped into another point. The same water is used twice. The electricity generated by these two hydro-electric plants is used for power for municipal service and domestic service lighting around Oroville. In addition, the company has some dredgers which are supplied from these two plants. We also buy some of our power for supplying these dredgers. The dredgers are supplied in part from power from the Pacific Gas & Electric Company and partly from our own.

(Testimony of William Durbrow.)

The country around Paradise is a very fertile country requiring water. The crops grown are olives, pears, apples and the like, and a great many berries. The water that we take from Little Butte Creek in the summer time is not sufficient for the use of the irrigating customers; that is, we could sell more water if we had it. Nearly every year, unless it would be a particularly favorable year, they do not have as much water as they would like. The fact that we have not any more water prevents any new country being planted to a large extent. When the Bader Company takes all the water, as they have done this summer, the Paradise people would be left without a supply at all. The water in the summer was measured out to the irrigators. The reason why the water was not measured out at the Bader Mine was because we could not get any more than \$50 or \$75 for the water, as that was as much money as it was worth to the mining company, and it was a matter of our getting as much as we could out of it and still leaving them a margin. Since the irrigators did not use the water in the winter time we had no use for it excepting as for such mines, as might care to take it, and that being so we sold it to them at a flat rate. The bills we sent to the Bader Mine or the receipts I might say, were for water service, our standard water bill,—which we sent to every one of our customers. The bills were sent [182] out each month and the checks would come in and receipted bill returned. No objection was ever made

(Testimony of William Durbrow.)

during the time I was there as to the form in which these bills were made out.

In 1907, though I can't remember any particular time, I think there was no question I was past the Bader spillway. I was there a good many times in 1907. We were doing a lot of work in 1905 and 1907, and I would be there more times during the time we were doing work. I did not see them taking water any time I past the spillway. Whenever it was reported that they were taking water we billed them for it. There was never any time we had any controversy with the Bader Mining Company during my time. If they were taking water I did not know anything about it. I certainly would have known had they taken it for any length of time. I would not have known it if they had taken water say for some time when the ditch tender had not been around, and then closed the ditch before the ditch-tender came back. I would not know it, of course, unless it happened to be in the irrigating season when we would notice the shortage of water.

When we increased the size of the flume we did not necessarily increase the capacity of the ditch. There could not have been any material change between the head dam and the Bader spillway. When a ditch was several miles in length it would not be possible to change the grade, because there is a constant point at the head-dam and at the spillway. We require water at the Kunkle Reservoir from the Nickerson ditch when we can get it. We can use more water than comes in the Miocene Ditch through the power

(Testimony of William Durbrow.)

plant, through the first power plant. That was the purpose of extending the Nickerson Ditch down to the Kunkle Reservoir, so that we could have a supply from two sources." [183]

Recross-examination.

I have seen the Miocene Ditch flow up to pretty close to the top of the berm, probably within an inch or two. I don't remember of ever seeing the Nickerson Ditch full to the top of the berm. The Miocene Ditch is not older than the Nickerson Ditch. The Pacific Gas and Electric Company do not supply, to my knowledge, anything around the Paradise country at all. The Paradise country is the country along below the Nickerson Ditch."

The bill sent to the Bader Mine after 1905 was only for one service; that for April, 1906. I think the amount of the bill was \$30.00. I guess there were a number of bills sent. We never could collect it. After April, 1906, we sent them bills. I don't remember of sending any bill after that for any other service. [184] I never saw any water running out of the Nickerson Ditch down to the Bader Mine in the summer time. My duties called me on that ditch quite a number of times. If I found water running down to the Bader spillway and my ditch-tender was not attending to it, I would fire him. I know there was not any water running down the spillway. I was along there. I was not along the Nickerson Ditch every day. There might have been many days that the Bader Mining Company had water running out of the spillway when I was not there. The ditch-tender

(Testimony of William Durbrow.)

would probably go along possibly on an average of once a week; perhaps not so often.

As a rule the water ought to be pretty high in the ditch in May. May is higher than the average of the year. It may be higher in December, depending on the season. I have known of years when you did not get any rain up to the first of January. In that case, you would practically have a minimum flow in December. The ditch runs higher in the middle of winter after the rains begin. May is usually a steady flow; fairly high, steady flow. The other parts of the year during the winter you get an intermittent flow; very heavy during the floods and then dropping down after the floods. May would probably be higher than the average of the year, but would not be as high as the highest water during the year, unless you got a storm.

**Evidence Introduced by Testimony of H. A. Biek,
Called by Plaintiff.**

I am forty-nine years old and reside in Oroville. I have been employed by the Oro Electric Corporation and its predecessors in interest since March 10th, 1909. My position has been ditch foreman. Prior to that time and from about September 1st, 1906, I was ditch foreman for the Pacific Gas & Electric Company at De Sabla. As ditch foreman for the Oro Electric Corporation I am in charge of the Nickerson Ditch and the Miocene Ditch and what is called the [185] middle division and lower Powers Ditch clear to Oroville, together with the laterals of the Nickerson Ditch around Paradise. During the

(Testimony of H. A. Biek.)

period I was employed by the Pacific Gas & Electric Company from 1906 to March, 1909, I had occasion quite frequently to be below the head-dam of the Nickerson Ditch on [186] Little Butte Creek. The Pacific Gas & Electric Co. had a syphon pipe crossing there and I used to cross quite frequently. During my time of crossing, which would be probably at least six or eight times during the summer, I never saw but very little water in Little Butte Creek below the Nickerson head-dam. Crossing the Nickerson Ditch at the opposite side of the creek, or one side of the creek, there at the siphon, I could see the water going down to the Nickerson Ditch. I could see the water going down the Nickerson Ditch as I crossed it. I think Little Butte Creek could easily have made that amount of water in the distance below the head-dam. I remember of one or two occasions I could see a little seepage around under the foot of the dam at the head of the ditch. I should not think at most there was more than 20 inches seeping out. The proportion of water in Little Butte Creek that went down the Nickerson Ditch in the winter time depended entirely on winter storms. I have seen it as high as close to 4 feet of water going over the dam in addition to what the Nickerson Ditch was carrying. In the summer time all the water would be diverted into the ditch excepting a little leakage that I mentioned. That condition of affairs has been true during the whole period since I entered the employ of the water company in March, 1909.

When I entered the employ of the company in 1909 Mr. Lincoln was ditch-tender on the Nickerson Ditch.

(Testimony of H. A. Biek.)

When I took the position as ditch foreman I went over the Nickerson Ditch and have gone over it quite frequently since. The first time I learned that any water was being taken from the ditch by the Bader people was in the latter part of April, 1909. Mr. Lincoln and Mr. Bickford, my predecessor as ditch foreman, and myself were going over the ditch on a trip of inspection. When we came to the Bader Mine gate Mr. Ed Bishop, a man that lives in Magalia, was there. The spillway was open.

(Thereupon Mr. Geo. B. Mowry was recalled temporarily to the stand and testified that Ed Bishop was employed by him at the [187] Bader Mine; that he was a miner and had worked for him off and on for years; that he worked in connection with the sluicing at the mine; that if the witness saw fit to send him up to turn the water down he always went and did it; that if the witness needed the water started for sluicing and washing out, he sent him up there to turn down more water.)

WITNESS.—(Continuing.) Mr. Bickford asked Mr. Bishop who turned the water on and he said he did, and he asked him if he knew that that was wrong; that the water belonged to the Oro Company. Mr. Bishop said that Mr. Mowry asked him to go up and turn that water on 15 or 20 minutes at a time and then turn it back into the Nickerson Ditch for half an hour, so that the water could catch up so that the water people would not miss it, and he closed the gate down while we were there. Mr. Bishop went on down the ditch to the mine. When water is shut off for a period of 15 or 20 minutes, and then turned

(Testimony of H. A. Biek.)

back into a flowing ditch, it will in very many instances catch up with the streams so that one below won't be able to detect the fact that water has been taken out. If it is turned off for long periods of time that would not be true.

I saw water proceeding down the flume or pipe from the Nickerson Ditch to the Bader Mine on different occasions. On May 3d I visited the gate and found the water going down. Mr. Davis and I were there together and found Mr. Bishop. Mr. Davis asked him who had opened the gate, and he said he did. There was quite a little conversation took place. One thing I know, he seemed to think Mr. Davis and I had it in for him in a way. Mr. Davis asked him who ordered him to turn the water on and he told us Mr. Mowry and that is about all the conversation we had and went on. He [188] said he was through with it and would close it.

On June 28th, 1910, I found that they had been taking water. The gate was closed and there was no one in sight. I reported the same to Mr. Davis and he told me not to bother with it any more; that he would bill the Bader Mining Company for the water and to have Mr. Lincoln sort of keep track and see how much they used.

On August 26th, 1912, I was at the Bader spillway. At that time I found that they had built a cross-gate in the Nickerson Ditch so that they could divert the water to the Bader Mine. Up to that time the amount of water that could be diverted through the Bader spillway would depend on how much was in the Nickerson Ditch. At low water it would not take more

(Testimony of H. A. Biek.)

than half. I think in extreme low water there would be a matter of 75 inches left in the ditch. The cross-gate I found there in August, 1912, consisted of posts put up on the sides of the ditch and a gate slid down between them to shut all the water from going down into the Nickerson Ditch. Prior to this time all the water in the ditch had not been diverted by the Bader people. It was all diverted the day I found the cross-gate in. That was the first occasion on which all of the water during any summer had been diverted since I had been there.

On August 31st, 1911, I posted a notice on the gate at the Bader spillway forbidding anybody from taking the water or interfering with the gate. The notice was signed by the Oro Electric Corporation. I had instructions to put a man there to watch the gate and I left Mr. Benham there. When we arrived the gate was closed, and he stayed for two or three days and reported not having seen anyone. On September 5th I visited the gate again. It was closed. I found the Oro Water name was erased and [189] Mr. George Mowry's name inserted there instead. The gate was closed then. I put another man on to watch the gate, to see who opened the gate and to prevent it being opened—a Mr. McAtte, on June 21st, 1912. At that time the gate was open. We did not close it that day, as Mr. McAtte said he would rather stay there and watch and see who closed it. I stayed up there with him possibly half an hour.

I was next up to the spillway on June 10th, 1912, in company with Mr. Gradon and Mr. Davis. We found the water going to the Bader Mine. Mr. Davis

(Testimony of H. A. Biek.)

closed the gate and turned the water back into the Nickerson Ditch. We waited around probably half or three-quarters of an hour. Nobody showed up from the Bader Mine. We thought we heard somebody coming up the trail and go around below us, but we did not see anyone. On July 11th I was there with Mr. Gradon and Mr. Benham in the morning, and found the gate open. I closed it and on returning in the afternoon found it as we had left it.

On November 14th, 1915, I took Tom Dickinson up there to watch the gate but found it closed. Dickinson stayed there two days. On Nov. 17th, 1913, I found the water was going to the mine and closed the gate. On August 12th, 1914, I found the gate open and all the water going from the Bader Mine down into Little Butte Creek. I also visited the Mineral Slide Mine and found the water all going down over the hill there into Little Butte Creek. On the way back from the mine Mr. Davis closed the gate and put a notice on the gate forbidding anyone from interfering in any way with the water or the gate.

I have been at the Bader Mine during the time I have been employed by the company. At that time the water was running from the Nickerson Ditch but was not being used. If I remember right, that was about three o'clock in the afternoon, in the month of August, 1914. At that time there was no water in the Nickerson [190] Ditch below the spillway. It was all turned in through the Bader gate and going to waste through the mine.

Cross-examination.

When the water was flowing 3 or 4 feet over the

(Testimony of H. A. Biek.)

head-dam across Little Butte Creek there was from 1,200 to 1,400 inches flowing down the Nickerson Ditch. I was with the Pacific Gas & Electric Company from September 1st, 1906, to March, 1909. Mr. Lincoln was ditch-tender on the Nickerson Ditch when I took the position with the Oro Water Company and he is still a ditch-tender there. There have been no other ditch-tenders on the Nickerson Ditch during that time. During the irrigating season I go over the ditch three or four times a month and during the winter time as high as two or three times a week on account of the high water. The most water is flowing in March, April and the latter part of May. In May there is a steady flow with the exception of big storms. A full ditch head runs to about the top of the thorough cut, and runs, I should think, from 1,200 to 1,400 inches. I would not call it safe beyond that. The lower bank extends two or three feet above the thorough out. The soil which was thrown out on the lower bank was composed of loose rock and shale and so on, which never became solid enough to hold water. There was some good-sized brush growing on it of considerable age. The ditch varies from 2 to 4 feet from the top of the thorough cut to the bottom, but there are places that it would get a good deal deeper than that. In the places where the depth was from 2 to 4 feet the width would vary. The average width of the thorough cut I should say is a matter of 7 or 8 feet, and the average width of the ditch about 4 feet. These dimensions are entirely below the thorough cut; that is, where it is cut through the solid

(Testimony of H. A. Biek.)

rock. In addition to that, there is a lower bank thrown up which may be a foot or 2 higher. [191]

When I was at the spillway on April 19th, 1909, Mr. Bickford called my attention to the fact that the water was going out of the spillway. He told me at that time that they were taking it without paying for it. After finding Ed Bishop there and the water running, he explained the whole matter to me, for I was going to take his place. He said they had no business taking that water without making some application for it or paying for it. I do not have any recollection of his telling me that they had been taking it prior to that time.

“Q. Did Mr. Lincoln tell you at that time that the Bader Mine had been taking water for years before that and had refused to pay for it?

A. No, he did not tell me at that time.

Q. When did he tell you that?

A. I could not say.

Q. He has told you that since?

A. Well, I have been told that they refused to pay for it. I can't remember the date.

Q. That is for the water they had been taking prior to April 18, 1909?

A. I don't know whether it was before that or not, but from my time on, I know that they were—I had been told they refused to pay for it.

Q. You knew that of your own information, didn't you? A. Yes.

Q. Then he told you in addition to that. What was the occasion of anyone telling you they refused to pay for it?

(Testimony of H. A. Biek.)

A. Well, I don't know what the occasion was, really; merely talking over business in a general way; we talked over about the water, it being his duty to look after the water, and reporting to me as his successor, he would tell me that he had not received any money for it."

At the time we were there on April 19th, 1909, Mr. Bishop closed the gate down. Mr. Bickford and he talked about it and he just closed it down. I don't think anybody asked him. I do not know whether he stayed there and raised and lowered the [192] gate. He said that he was told to turn it on for fifteen or twenty minutes at a time and then close it down. We went on down the ditch and did not return any more. We saw him leave the place going down to the mine. Neither Mr. Bickford, myself or Mr. Lincoln went to the Bader Mine at that time, nor did we see Mr. Mowry or any officer of the Bader Mining Company. Mr. Bickford did all the talking. I don't know that he told him to leave the gate down. He asked him if he did not know he was doing wrong by doing that. He really gave no orders at all that I can remember of. He told us that Mr. Mowry instructed him to open the gate for fifteen or twenty minutes, and then close it down for half an hour before he opened it again, so that the water people would not miss the water. I think he reported it into the office at Oroville. On May 3d we again found Mr. Bishop at the spillway. He was there on both occasions when we arrived. Mr. Davis did most of the talking that day. Mr. Bishop said he was

(Testimony of H. A. Biek.)

through with the water and shut the gate down. We did not see Mr. Mowry at that time nor did we go down to the Bader Mine to see about it. The gate was closed when we left, and I think Mr. Bishop was still there. He said he was through with the water for that day.

Between May 3d, 1909, and June 28th, 1910, I was over the ditch quite a number of times, but in my visits there did not find any water running through the Bader spillway. My visits would probably average once a week, probably one for two weeks. I would be at the spillway generally from ten o'clock in the morning to two or three in the afternoon. Mr. Lincoln was the ditch-tender at that time. He was on the ditch every day in the summer because he was down in the irrigating district distributing water. If there was a shortage of water, or anything that he thought wrong, [193] he would take trips up to the head-dam. If the water was getting short he might go up there two or three days or every day. Between June 28th, 1910, and August 26th, 1912, I had passed the Bader spillway quite frequently, but did not find it open. Prior to the summer of 1913 I think I was over the ditch on an average of once a week and the only times I have seen the gate open is at the times [194] I have enumerated. I did not go down and see Mr. Mowry, or anyone else at the mine on June 28th, nor on August 26th, 1912. On August 26th, 1912, I raised up the cross-gate that was in the ditch. I did not go down to the mine because I was instructed to make reports to my super-

(Testimony of H. A. Biek.)

ior. I was simply instructed to see if I could find anyone opening or closing the gate in the spillway; nothing further than that.

The Nickerson Ditch has been cleaned out three times since I went there in 1909. The last two years we have not made a thorough cleaning of it. We did before that time. In doing this cleaning I did not have to exceed more than eight men at the most at any time. They cleaned it out for the full length. When I took the ditch it was in good shape—well kept up.

On August 12th, 1914, when Mr. Davis and myself were at the spillway we went down to the mine, but did not see anybody. There might have been somebody underground, but we had no business underground. We then went up and closed the gate. While we were down at the mine the water was running through a flume or sluice box. We were possibly about 100 feet from the flume and did not look in. The water running down the spillway at that time was about 31½ inches deep and 3 feet wide, and after it left the Bader Mine it went down Little Butte Creek.

I personally never notified any officer of the Bader Company not to take water out of the ditch.

Redirect Examination.

I always made my reports to Mr. Davis. There was no enlargement of the ditch during the period I was familiar with it and there was no rebuilding of the head-dam in Little Butte Creek. There was some repairing and maintenance work but the dam

(Testimony of H. A. Biek.)

was not increased in height. If it had not been cleaned for several years and kept up in pretty good shape, we could never have done it with eight men in the time we cleaned it. The community at Paradise is agricultural [195] and they require water for fruit and berries during the summer time. Even if the Bader people did not take the water as it did during the summer of 1912 we would have required all the water in Little Butte Creek for the irrigators.

Recross-examination.

The weir is in the middle of the dam, which is the middle portion of Little Butte Creek. Slickens and sand is washed down so that a channel is formed in the bed of Little Butte Creek above where the same bar is formed and runs through the bed of the creek through a little artificial channel to the head of Nickerson Ditch. The only time the water flows over the sand bar and over the dam and weir, is when there is a high flood or storms.

Evidence Introduced by Testimony of Tom Irwin, Called by Plaintiff.

I am forty-seven years old and reside at Chico. I lived at Magalia about seven years off and on. I have worked for Mr. Mowry and the Bader Mining Company—the first time in 1911. He hired me in 1912 to watch the spillway. When I arrived at the spillway the gate was closed. Bill Bader who had come to the ditch with me opened it up. When we came down from home we came down early in the morning—about 7:30, and there was a gentleman at

(Testimony of Tom Irwin.)

the spillway—a Mr. McAtte employed by the water company. He asked me if I was going to get the water out of the ditch that day and I told him I was. He asked me if I was going to stay there that day and I told him I was. We talked a few minutes there and he said, “I will see you to-morrow,” and he walked away. We saw him the following day some time in the morning. He did not say much of anything at that time. At that time Bill Bader stated to Mr. McAtte, “We have got to have some more water,” and he went and raised the gate and he told me to take charge of it and I sat down. I saw Mr. McAtte was talking to Bill Bader, but I don’t remember what he [196] said. Bader spoke to me and told me to stay there and he said “If one can’t keep it open two will,” and he walked on to the mine.

During the period I was working for the Bader Mine water was used at the mine from the Nickerson Ditch. We did not use it at night time. I think one-fourth of the time would have sufficed to use the water down through the mine, whatever water they had use for. The rest of the time it ran down through the gate to waste.

Cross-examination.

I first went to work for the Bader mine at the end of January, 1911. I worked two shifts at that time, and during those two days water was used from the Nickerson Ditch. I was a miner working underground. The water was used outside and the only opportunity I had of seeing the use of the water was in the morning, at noon, and at night for these two

(Testimony of Tom Irwin.)

days. When I stated that they could have got along with water for one-quarter of the time I meant that it would take only that amount to wash 10 or 12 cars of dirt. During the two days I was there three men were working.

I worked again for Mr. Mowry in 1912—three shifts at one time and a shift and a half at another time. I watched the gate three shifts and worked in the mine a shift and a half. They were getting the water at that time out of the Nickerson Ditch. About 120 inches were running in the ditch at that time. After Bill Bader opened the ditch it stayed open until about 4 o'clock, when I shut it down and went home. Bill Bader opened it the next morning. He just walked up and opened the gate while McAtte was there. McAtte asked him if he was going to keep it open all day and he said yes. McAtte had a rifle. He did not try to close the gates at all while I was there. I was not armed. [197]

**Evidence Introduced by Testimony of H. H. Lincoln,
Called by Plaintiff.**

I am forty-eight years old and have been employed on the Nickerson Ditch since 1909. Prior to that time I was in the employ of the company but on the Miocene Ditch. I took up all the duties on the Nickerson Ditch on January 1st, 1909, as ditch-tender, and have been such ditch-tender ever since.

The first time that I recall after going on the ditch or seeing water going through the Bader spillway was the first part of April, 1909. The gate was open when Mr. Bickford and myself got there. I

(Testimony of H. H. Lincoln.)

had never noticed any diminution of flow in the ditch prior to that time. If one is down a ditch and the water is cut off above by someone taking it out of the ditch, you could tell the water had been cut off when it is low in the ditch. The diminution of the flow would show that fact. Mr. Biek was along at the time I refer to. When we got up there there was a man by the name of Ed Bishop lying there on a little bridge across the ditch. Mr. Bickford talked with him. I don't remember anything that was said except that Mr. Bickford asked him how long he had kept the gate open, and he said he had orders to keep it open 15 or 20 minutes, and then shut it down for at least a half an hour. That is all that I remember about being said. He closed the gate there before we left. If one shuts off the water for a limited time like that and turns it on, detection would be difficult in a small lateral, and probably would in a ditch like the Nickerson Ditch. If the water was not too far away it will catch up and can hardly be detected. I have had experience with water thieves. Sometimes they employ this method. I had been up the ditch rather infrequently up to that time. During the irrigation season my work had been below. If there had been a shutting off of the water for any material time it would have been noticeable down there, but I noticed no such diminution. [198]

The first date I have in my memorandum-book was November 7th, 1910. The Bader Mine was taking water on that day. Mr. Davis wrote me and told me to keep an account of the water and he would bill

(Testimony of H. H. Lincoln.)

them for it, and that is when the account started in. I had reported to Mr. Davis, or Mr. Biek, rather, that they were taking water there at that time. They used water at that time on the 7th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 29th and 30th of November, and December 3d, 6th, 15th, 19th and February 22d, 1911. That was the last time I kept any tab on them.

Between the occasion in April or May 1909, when they were using water, down to November 7th, 1910, I had detected no other use of the water by them. I was on the ditch all the time.

To February 22d, 1911, and during that season, once in awhile the water was used by the Bader people. On October 8th, 1911, I found the gate open and shut it down and it remained down until the 27th. I shut it down again and it remained down until the 31st. At that time the mine was taking all the water. The people were bothering us so much that Mr. Davis wrote me and told me he wanted me to go and shut the gate down and keep it down and if they offered any resistance I was to report to him. I don't recall of ever posting a notice up there. Between February 22d, 1911, and the 18th of October, no one took any water out to my knowledge. I shut the gate down on the 27th and it remained down until the 31st. On the morning of October 31st the gate was open and I shut it down, and about 15 or 20 minutes afterwards Charley Bader came up from the mine, or from that direction, and told me he had not got down to the mine when the water stopped.

Before the cross-gate was put in the Nickerson

(Testimony of H. H. Lincoln.)

Ditch between August 19th and 23d, 1912, it would not be possible for the Bader people to take all the water out of the ditch. I should think [199] that the spillway could take about 70 to 75 inches, something like that. The Bader people this last summer cut off all the water that was running in the ditch. Prior to that time they had not done that while I was there. There is tons of fruit rotting on the ground at Paradise to-day for want of water for irrigating those trees. The gardens are perfectly dried up and have been for the last month or six weeks.

I was on the Nickerson Ditch the day in May, 1913, when Mr. Gradon made the measurements, and I observed the height of the water in the ditch. The water that day was flowing right up to the high-water mark. The ditch was never enlarged during my time there. It might be possible after the lapse of several years, to tell if a ditch had been enlarged in some places; other places it would be impossible to tell. When I was there in January, 1909, I did not observe any indications on the ground of an enlargement of the ditch above the spillway. The dam across Little Butte Creek was not rebuilt or increased in height during my administration.

Cross-examination.

The way I happened to make a memorandum of various items concerning the Nickerson Ditch was that there was a dispute at the time over the water and I made this memorandum to report the things to the office. Under entry of October 31st, 1911, I have a note as follows: "Shut gate down and Charley

(Testimony of H. H. Lincoln.)

Bader came and raised it and told me that Mr. Mowry said he would take water when he wanted it and if I did not let the gates alone they would have me arrested." I never shut the gate down after that time. I left that for somebody else. On Nov. 3d it appears from my memorandum that the gate was opened and water running out. I did not shut it at that time. [200]

On November 7th, 1910, when I saw the gate open and the water running I billed them for 15 inches which I thought was about half the amount running there. On that date I guess there were not more than 150 inches flowing down the ditch. Mr. Davis told me to measure the water as I did after November 7th, 1910. I reported to him that they were taking the water. When I found the gate open after the trouble began I reported the matter to Mr. Davis. When I say "after the trouble began," I mean when they began to take water to any amount to exceed more than a few hours or more. When I stated that the last time I saw water running down was on February 22d, 1911, I was in error. The last time was March 30, 1911.

There is a spillway a short distance below the head of the Nickerson Ditch on the side of the dam that can be opened and the water let out and spilled into Little Butte Creek. I have never had water spilling out there except when the ditch filled up with snow and I flushed the snow out in that spillway. When I cleaned or flushed that out I closed it and no water was spilled out. I never saw the gate in the Mowry

(Testimony of H. H. Lincoln.)

spillway open prior to August 12th, except on the dates I have mentioned. I have been there sometimes and seen the flume wet and the gate has been shut down again.

The first time I met Mr. Mowry was when I presented a bill to him for the water. He was in the city at the time and I did not find him when I went up to the mine once a month to present the bill. I saw him in Mr. Cohn's store. I told him I had the bill from the company and I presented it and he read it, handed it back and told me that the company ought to know better than to send him a bill; that he never did pay for water, and never would; that if he wanted it he was going to take it when he wanted it. [201] That was after 1910 when I began to measure the water to him. I never presented a bill to him after that that I know of. That was the only bill I presented. I did all the collecting along the ditch for the water that was used.

I remember cleaning the ditch once; I think it was 1911. Doing the work I had two men besides myself. We cleaned all the way from the head-dam down below Mr. Mowry's. My memorandum shows that they cleaned the ditch on November 9, 10, 12, and December 12th. In cleaning the ditch we did not do anything more than take out the trees and brush that was in it.

I remember an occasion when I met Mr. Mowry on the ditch. I don't remember exactly when it was but it was after I presented him the bill for the water. I was going up the ditch because I had noticed that

(Testimony of H. H. Lincoln.)

the water had ceased running, and met Mr. Mowry coming back. He told me he was coming down from home; that he got down to the ditch and saw there was no water in it and went up and opened the gate. I am not positive, but I think it was after the gate was put across the ditch in August, 1912. I went on to the head-dam and overtook Mr. Mowry a little before he got back. I walked along with him until he turned off at the spillway to go to his mine. The spillway gate was open and was open when I went up. I remember another occasion when I met Mr. Mowry and some gentleman on the ditch, and Mr. Mowry asked me to shut his gate down as I went by; that he did not need the water for a little while. When I went down I shut the gate. Mr. Mowry was going back towards Magalia when I met him. That was about the time they usually turned the water down the ditch when they got through mining after the gate was put across there, and they took all the water. It was after the trouble had started in and I had reported to Mr. Davis and he had been up there and taken thematter off of my hands. I had [202] no more to do. The last time I recall shutting down the gate was on October 31st, 1911.

I have seen water running down the Mowry spillway often; not every day, not one-quarter of the time. I passed the Mowry spillway twice a day generally, the times when I passed it being very irregular, varying between nine and ten in the morning, until after dark at night. I never saw anybody loitering around the spillway nor any one acting

(Testimony of H. H. Lincoln.)

suspiciously there. After the time that Mr. Davis sent Mr. McAtte to the spillway I never shut the gate. I never had orders since to shut the gate.

At the time I was on the ditch in April or May, 1909, the time when Mr. Ed. Bishop was there, Mr. Bishop did not state to me nor in my hearing the reason why he was manipulating the gate. I do not remember of ever seeing anybody there afterwards manipulating the gate. I never saw a diminution in the flow of the water down the ditch after that. The only diminution I saw was recently, since 1912, since the cross-gate was put across the ditch. Prior to August, 1912, all to indicate that there might be a cross-gate below the Mowry spillway, was a post on the side of a ditch.

The first report I remember of having made to Mr. Davis was in November, 1910. At that time I found the gate open and did as I was ordered to do,—reported it. I had no occasion to report to Mr. Davis up to that time because I had never found the gate open. They had been taking water prior to that time, but not to any great extent, and I did not find the gates open. I knew they had been taking water because when I came along there the flume was wet for several inches up on the sides and the gate shut down again. I didn't know positively whether it was the Bader people or somebody else. I knew the spillway led to the Bader Mine. I don't remember of ever going down to ask about it. I did not report to Mr. Davis, [203] that I found the spillway wet. I noticed that the flume had been

(Testimony of H. H. Lincoln.)

wet on the bottom and sides; the sides were wet up probably a couple or three inches.

If as much as 100 inches had been taken out of the ditch I would have noticed it, if I had been there near the main ditch. If I had been on the lower end of the laterals I don't think I would have noticed it. If it was out only a short time I could not tell it at all on the lower end of the laterals, because the water would catch up before it went down. On these occasions when I found the flume wet I noticed a slight diminution in the flow of the ditch which I attributed to the taking of the water at the Bader Mine. Notwithstanding that, I did not report to Mr. Davis for I did not generally report until I caught somebody at it, or found the gate up. The only reason that I have for stating that I did not make the report to Mr. Davis before November, 1910, was that in my opinion they had not been taking a material amount of water. The cross-gate below the Bader Spillway is not put in until the water gets very low, generally in August and September. They put the gate in there and took all the water out in 1912, 1913 and 1914. When I went down there in 1909 I had never seen the ditch before and could not tell anything about it. There was nothing there to indicate to me that it had been changed or widened. I could not tell from my observation whether it was formerly 2 feet wide or 10 feet wide.

The path upon which I walked along the ditch was on the lower sides, and I had been walking on it

(Testimony of H. H. Lincoln.)

since 1909. It is traveled by a few hunters and fishers, and some miners use it. The path is on the top of the dirt that has been thrown out of the ditch. I remember having a conversation with Mr. Mowry at the Bader Mine in 1913. I asked him if he did not think he was using [204] more water than was necessary. He asked me if the water would do the Paradise people any good or not. I told him it would do them good at any time they got the water. He said he would shut the gate down at night or have his men shut it down.

Redirect Examination.

This conversation I had with Mr. Mowry in 1913 was late in the irrigating season, either in August or September. Water was required at that time for the crops at Paradise. All the water they were getting was what was turned down at night. I went up on the Nickerson Ditch on January 1st, 1909, and up until that time there had been no water taken out of there to my knowledge. The water taken out after May, 1909, and up to October, 1911, was the water that I had billed to them. There was no water to my knowledge taken by them up to that time. After Mr. McAtte came up my instructions from Mr. Davis were that he would send a man up there to look after it and I was to continue on with my work below. The reason I did not interfere after that time was that I understood the matter was in the hands of the legal department.

I think the time when I met Mowry on the bank was in 1913, and after the matter was in court. My

(Testimony of H. H. Lincoln.)

instructions were not to get myself into trouble; use no violence whatever.

Recross-examination.

When the irrigation starts in the spring time, usually in April and May, I go up the ditch once or twice a month, and sometimes once every two months; that is, whenever I think it is necessary and there is anybody to look after. If the water ceased running I would go up to see what was the matter. I went up several times on that account. I could not say how many. I found the water going before I got there and I turned around and went back. All the water that I know of that was taken by them from May, 1909, [205] to October, 1911, was what I billed them. I know of their taking no other water except that during that period. The water I billed them was from November 7th, 1910, to November 22d, 1911.

**Evidence Introduced by Testimony of C. W. Bader,
Called by Plaintiff.**

I am sixty-two years old and reside at Magalia, Butte County. I have lived there since 1882. I remember the Powers Ditch when it was in full operation. It was known as the Walker and Wilson Ditch, and as the West Ditch. I remember when Powers and West ran it but I do not recall when Major A. F. Jones had charge of it, or Major McLaughlin was in possession of it.

Before the Nickerson Ditch was built there was a dam across Little Butte Creek which diverted the water into the Powers Ditch,—the Powers Ditch

(Testimony of C. W. Bader.)

taking all the water which was flowing in Little Butte Creek in the summer time. It took the water to the Mineral Slide Mine at the top of the hill where they used it for a long time for mining. After that they used it at Thompson Flat, about a mile above Oroville.

I remember when Nickerson dug the old ditch out but I don't remember what date it was. I never kept any account of the date. After Nickerson got his dam fixed up he took all the water out of Little Butte Creek in the summer time. They are taking it now.

"Q. No question about that?

A. Yes, they took it out.

Q. Have they ever since that time, so far as your knowledge extends, taken all of the water in the summer time out of the Nickerson Ditch, out of Little Butte Creek through the Nickerson Ditch?

A. Well, I know sometimes they did. I could not tell you all the time, because I was not down there.

Q. I mean, so far as you were there in the summer time, had they always taken the water in Little Butte Creek, which was there in summer time, down the Nickerson Ditch?

A. Yes, they took it into [206] the Nickerson Ditch. You see, the water belonged to the lower ditch.

Q. (Intg.) Belonged to the Powers Ditch?

A. And they took it away.

Q. They took it down the Nickerson Ditch?

A. Yes."

(Testimony of C. W. Bader.)

I recall Mr. Mowry putting in a head dam and flumes in the upper portion of the Powers Ditch in 1899 or 1900. That was after the Nickerson head-dam was put in.

“Q. After the Nickerson Ditch was put in, you have just stated, after the Nickerson head-dam was put in, in summer time the water did not flow past the Nickerson head-dam; is that correct?

A. That is correct.

Q. Now, what water, if any, did this dam that Mowry put across Little Butte Creek at the head of the old Powers Ditch—what water did that get?

A. Well, there was water running down, a little down the creek. Of course when they took it away from them, that could not pack any more water—after the water was taken away from them.

Mr. CROSS.—Q. What could not pack any water?

A. The Powers Ditch could not pack any water when the Nickerson Ditch took it from them.

Mr. ORRICK.—Q. The Nickerson Ditch took out the whole flow? A. The whole thing.

Q. Was there any water at any time of the year that was stopped by this dam that Mowry put in there across Little Butte—was there any water, winter water, or what?

A. In winter time, of course, there was water enough for all of the ditches, and more too.

Q. So this dam that Mowry put across there caught the winter water, did it?

A. Yes, it caught the winter, and caught the other water, too, if they would leave it alone. [207]

(Testimony of C. W. Bader.)

Mr. CROSS.—Counsel is leading the witness, and I object to it.

Mr. ORRICK.—I am trying to get the thing clear.

Q. Mr. Bader, what time of the year did this ditch called the old Powers Ditch carry water, after it was rehabilitated, put in order by Mr. Mowry—what time of the year did you get water there?

A. Well, we would get in the winter time, of course. You know the upper ditch took the water out.

Q. Would you get any there in summer time?

A. No, it rotted all his flumes and everything went to thunder.

Q. The fact that you got none there in summer time rotted the flumes: Is that the idea?

A. Rotted the flumes, yes. You take any flume, and take the water out, it will rot and soon go to pieces.

Q. What I am getting at, Mr. Bader, is whether or not in summer time any water flowed through this ditch that Mr. Mowry fixed over down there in the summer time?

A. No water could get in in the summer time.

Q. Because all stopped by the Nickerson head-dam that was above?

A. It took it away, yes." I am Mr. Mowry's brother-in-law.

Cross-examination.

Mr. Mowry used the Powers ditch quite a number of years. I don't remember very much about these old matters. The Powers is the oldest water right.

(Testimony of C. W. Bader.)

Then comes the Delaplain. The Delaplain head-dam was put in when I was a little boy. When I first began to remember the water used to run into the Powers Ditch. At that time it was taking all the water. I saw the water running through both the Powers Ditch and the Delaplain Ditch at one time,—a good many years ago, 30 or 35 years ago. I have been working for Mowry the last 20 years at different times. I worked on the head-dam of the Thompson Flat Ditch and worked on the flume around the [208] mine. I could not tell the date when I put in the head-dam for Mr. Mowry. I was with him when he put up a notice of appropriation of water in Little Butte Creek. It was shortly after that that I worked on the head-dam of the ditch. I have seen water flowing through that flume during the summer and winter, the water coming from Little Butte Creek. It passed the head-dam of the Nickerson Ditch in winter and there was some seepage going through in summer. After 1906 the flume rotted out, and after that no water to any amount flowed down Little Butte Creek. I think there is 10, 12 or 15 inches flowing in Little Butte Creek between the Nickerson head-dam and the Powers Ditch head-dam in the summer time, coming from springs. I have worked for Mr. Mowry since 1906 at the Bader Mine. They have used water there in mining continuously. They got the water out of the Nickerson Ditch through the Mowry spillway. I could not tell when the Powers Ditch went dry. Before Mr. Mowry took the water

(Testimony of C. W. Bader.)

out of the Nickerson Ditch he got it out of the Powers Ditch in the winter time. He got it out of the Nickerson Ditch in the summer time. I could not tell you the date when the water ceased flowing through the Powers flume but I know the flumes were dry in summer; that is all I know. There could not have been much water in there. This was after Mr. Mowry began to use the upper ditch. He had to use it. He took the water and used it from the upper ditch. They took the water; he did not take it. By "they" I mean the Nickerson Company. They took the water away from there into their ditch, and after that his flume rotted out and then he used the water from the Nickerson Ditch. Prior to that time he used the water from the Powers Ditch, as long as there was water in the ditch. All the time he was mining he had to have water. He used it through the Powers Ditch for quite a while and then he used it from the Nickerson Ditch. [209]

Redirect Examination.

"Mr. ORRICK.—Q. They took it all away, Mr. Bader, when they constructed the Nickerson Ditch, did they?

A. When they fixed up the Nickerson Ditch they took it all away from the lower ditch and ran it through the Nickerson Ditch.

Q. That was before this Powers Ditch was put in condition again by Mr. Mowry?

Mr. CROSS.—Objected to upon the ground it is leading.

(Testimony of C. W. Bader.)

A. Yes. His flumes went out; he could not use the ditch, the water."

The Powers Ditch was the first on the ground, and all the water came down the Powers Ditch. Mr. Mowry was using the water from the lower ditch when they fixed the other ditch up and took it down. The last time they built the Nickerson Ditch was in the 80's some time. I was there when Mr. Mowry took up a water right on Little Butte Creek. I don't remember whether it was after the Nickerson Ditch was built, I could not tell whether it was built at that time or not.

Recross-examination.

When the Nickerson Ditch was being built by Mr. Nickerson I was working for Mr. Mowry at the Bader mine. I know I began to work for Mr. Mowry some time in the 80's, but I could not tell exactly what date. Mr. Mowry never rebuilt the Powers flume after it rotted out. After the old flume built by Powers had rotted out Mr. Mowry put in a new flume and used it for a number of years. After that when the water was taken out of the Nickerson Ditch the flume went to pieces and was never rebuilt.

Redirect Examination.

Mr. Mowry took up the water right before he put the flume in. All the water has run down the Nickerson Ditch since [210] they took it away. The water used to belong to the lower ditch you know,—the Mineral Slide Ditch,—the Walker & Wilson Ditch. After Mr. North constructed the Nickerson

(Testimony of C. W. Bader.)

Ditch it took all the water out of Little Butte Creek in the summer time. If they turned it off they were bound to take it out. You see they turned it out.

Recross-examination.

After the Nickerson Ditch was built the water was pretty scarce in Little Butte Creek in the summer time. I have seen water flowing in the Mowry flume lots of times. I put in an upper story and in the winter time you could fill the flume. In the summer time there was not any water in the creek, not down there. There was water above, the upper ditch was taking it out you know. If the upper ditch let the water run down Little Butte Creek the other ditch would carry it and it never would have dried up.

“Q. After you built the head-dam in the Powers Ditch you got the water out of there, out of that ditch to run and operate that mine, didn't you?

A. Out of the Powers Ditch?

Q. Yes.

A. We got the water out of the Powers Ditch and the other ditch; both ditches we used.

Q. For how long did you use them?

A. I don't know; that I could not tell you. Of course in the summer time we did not have enough water to sluice with.

Q. You had water for everything except for sluicing?

A. In the summer time we did not have any for sluicing.

Q. Did they do any hydraulicking at that time?

A. At the time we both used both ditches?

(Testimony of C. W. Bader.)

A. Yes.

A. We did not hydraulic, but we just sluiced the hill, let the water run. [211]

Q. That was when you had a big slide there?

A. Yes, we run it out.

Q. The only time you used both ditches was when you had the big slide.

A. Only a big slide.

Q. But when ordinarily mining you used only the Powers Ditch, did you not?

A. There was quite a while we used the Powers Ditch when drifting.

Q. And did not use the Nickerson Ditch?

A. Did not use it for awhile.

Q. That was for a number of years?

A. Until they took all the water out of Little Butte Creek; that dried up the flumes and they went out.

Q. Both summer and winter time you used the Powers Ditch? A. Yes, sir.

Q. For drifting? A. Yes.

Q. In reference to the time that Murphy had the gang of Chinamen on there, do you know whether or not it was about that time that they took all of the water out of Little Butte Creek and turned it down the next ditch?

A. After they worked on the ditch?

Q. After Murphy worked on the ditch?

A. Yes.

Q. After that you could not get any water out of the Thompson Flat Ditch?

(Testimony of C. W. Bader.)

A. Could not get any water in the lower ditch.

Q. The water quit running in that after Murphy with his Chinamen had worked on the ditch?

A. Yes, he turned it all down the ditch."

Redirect Examination.

In the summer time you could get no water through the Mowry flume. I don't think we could ever get the water through the flume in the summer time. Sometimes we used water at the mine in summer time, 10 or 15 minutes, something like that, and finally it just slacked up altogether and dried up, and the flume rotted [212] out. There were some times when the dam would leak, something like that, and the water would go through it. That is the only time water would go through it, when the dam would leak. After Mr. North enlarged the ditch they took all the water out of Little Butte Creek so consequently the flume did not get the water below.

"Q. It was when North did it, not when Murphy did it: is that right or wrong?

A. Well, when they took the ditch up, I don't know who was the head man of it—

Q. (Int.) You know Mr. North of course?

A. Yes, he was working for the company at the *same as* I was working for Mr. Mowry.

Q. Was it when Mr. North was enlarging the ditch from that time on, that you did not get water through the flume, or when?

A. Ever since it was enlarged, ever since they put the water through that ditch."

(Testimony of C. W. Bader.)

Recross-examination.

Mr. North enlarged it, first, and afterwards Mr. Murphy. He worked on it with a crowd of Chinamen. Mr. North fixed the ditch up and they took all the water out of Little Butte Creek so it did not allow Butte Creek to have any more water.

“Mr. CROSS.—Q. When Mr. North worked on the ditch was the flume that you and Mr. Mowry or Mr. Mowry built in there, in existence?

A. When Mr. North worked on the ditch?

Q. Yes.

A. I don't think as far as I could look back—he did that work long before we worked on that lower ditch.”

Evidence Introduced by Testimony of William S. Hendrix, Called by Plaintiff.

I am fifty-two years old and reside in Magalia. I have lived in Butte County since 1871. When I first came to the county I resided around Chico, and then moved near Nimshew, which is on the other side of Magalia, and have resided there practically ever since. [213] I am a miner, flume builder, or any old thing that comes in to work at where the most money is in it. I worked for Mr. Mowry at the Bader Mine in 1893 of 1894. At that time the Nickerson Ditch was constructed and the Powers Ditch from the top of the old Mineral Slide Mill was used to run around for irrigating. The water in the old Powers Ditch from that point came from the Nickerson Ditch. When I started to work in 1893 the upper part of the Powers Ditch from Little

(Testimony of William S. Hendrix.)

Butte down to where the water was transferred over from the Nickerson Ditch was not in operation. The Powers Ditch was in operation on the entire length from Little Butte down, up until the Nickerson Ditch took the water out up where it is. At that time the old Powers Ditch took all the water in the summer time as long as it was in the creek. I do not know how long I was acquainted with the Powers Ditch before the Nickerson Ditch was constructed but it was a long time.

“Q. What occurred respecting the water in Little Butte when the Nickerson Ditch was built?

A. Why, the Nickerson took all the water out, and it was dug for an irrigation ditch, for the Paradise Colony. A man by the name of Nickerson built a kind of land office, or such a thing, down at Paradise and was going to sell water to the colony for irrigating purposes.”

Jack Powers owned it. Since the Nickerson Ditch has been built it has taken all the natural water of Little Butte Creek in the summer time. By the “natural” water of Little Butte I mean the water other than that brought in by the Snow Ditch. They said something about the Snow Ditch being brought in there. I don’t know when that was. I was once on the Snow Ditch in August, 1897, I think, and there was no head-dam at that time. [214] I have been familiar with the Nickerson Ditch from the time it was built practically to this date, been around it and on it and over it and about it. Very little of the ditch could be seen. The flume

(Testimony of William S. Hendrix.)

was all smashed down by snow. At least as early as 1907 no water flowed into Little Butte Creek from the Snow Ditch. It looked to me as if it had been out of commission for some time.

I think part of the dam that was built across Little Butte Creek at the intake of the Nickerson Ditch went out in one year. I am not sure, nor can I tell you just when it was. The head-dam there has never been enlarged that I know of. The Nickerson Ditch has not been enlarged that I know of. They gave it a good cleaning, [215] trimming, and done some shooting; took out alders and such as that. I think if you will go out in old Matt Bader's field and look at the rocks and walls you will find it is about as they put it there.

I worked for Mowry in 1893 or 1894, and worked for him from April, 1913, to the end of that year. I think I worked one month in between those dates, but I could not say just when. Mr. Mowry located a water right on Little Butte Creek in March, 1899, I think. In 1899 there was no water in Little Butte Creek below the Nickerson head-dam in summer time except what would go through the dam, soak through. The country between the head-dam of the old Powers Ditch and the head-dam of the Nickerson Ditch is rough. It is a hard country to go through. It is rough, brushy and rocky. I don't think there is any trail there which is customarily used by people on horseback packing, but I am not sure.

When I was working for Mowry when this water

(Testimony of William S. Hendrix.)

right was located, I did work in constructing the head-dam and flume. A little dam was first built at the old Powers intake. At that time there was no dam there. The work was done by myself and a fellow by the name of Pat McGovern, O. E. Warren, and an old man named Ed. McKenna. One of them quit either the 3d or 5th of July, and no more were put on. When we first went out to put the head-dam in the surface water had been running down there and there was some little water, quite a little bunch of water; I could not say how much. When we got the dam fixed, ready to tighten it up and put the water in I don't think there was over 25 inches of water there. Possibly a stream like Little Butte would make up that much water from the distance between the head-dam, but at that time there was a ditch ran some water around there. Matt Bader had a ram and used to use a little water on that, and if that had come down it might have helped it some, I ain't sure. [216] The flume we put in was a little flume—common boards, 6-inch lumber and 2-inch scantlings; bed sills, what we call bed sills—a very frail flume.

When we went up to put up the dam—I think Mr. Mowry and Ed. McKenna went to look at it—and Mr. Mowry says to me, "Bill, we can get winter water here and save buying water." The flume possibly carried the summer water that there was there in the creek. I don't know just how much but it covered the cost of the entire work done by Mr. Mowry on this relocation on the side of the old Pow-

(Testimony of William S. Hendrix.)

ers Ditch. I think we were something like 90 days in finishing the job. I don't think the work would cost as much as \$5,000, or anywhere near such a sum, but could be done easily for \$1,500 or less.

I commenced to work for Mr. Mowry again in April, 1913, and continued until December, 1913. I think there were four of us working at the first, and then we were cut down to three, and then part of the time two. We were drifting a bedrock tunnel most of the time, and then drove into gravel, all tunnel work. Gravel was brought out of the tunnel and put in the hopper and washed. When we were in bedrock we would run it out and dump it and he had this water come down there and run over it and tried to wash it off down into the canyon. When we had a little gravel he would have to wash it out. Maybe it would take an hour or such a matter in a day, and maybe it would be three or four days. This washing process would continue from an hour to an hour and a half or maybe two hours of the day. During all the rest of the time the water ran absolutely to waste down through the mine.

The Bader Mine is a little drift mine. I think the greatest number of men I have seen working there was 10 or 12, the average number being 3 or 4, I guess; most of the time 2. The connection between the Nickerson Ditch and the lower end of the Powers [217] Ditch was made shortly after the construction of the Nickerson Ditch.

Cross-examination.

I had only one talk with Mr. Davis prior to com-

(Testimony of William S. Hendrix.)

ing down here. He asked me a few questions a week or so ago. I have heard of the dispute between the Oro Electric Corporation and the Bader Gold Mining Company talked about. It has been talked of among the people for a long time.

I worked for Mr. Mowry from 1893 or 1894 to 1896. I came back I think in about the latter part of 1893, and worked until 1900 or 1901, or thereabouts, I think. From 1893 to 1896 I was mining in the mine, taking out gravel. They got the water at that time from the Nickerson Ditch. Up to 1899 when he filed his appropriation he got the water which he washed with out of the Nickerson Ditch. After 1899 after the head-dam and flume was built, up until the time I left he was using winter water out of the Jack Powers Ditch, or the old ditch that he located. That was up to 1900 or thereabouts, when I left. We started the ditch I think somewhere in June, the middle of June, and got through the ditch somewhere along in September. From September until the latter part of 1900 when I left he used water out through the flume by reservoiring it at the head-dam and letting it go down the ditch. He did not buy any water from the Nickerson Ditch at that time that I know of.

From 1900 to 1913 I was in there and I paid no attention to the use of the water by Mr. Mowry or the Bader Mine. From April, 1913, to December 30th, 1913, when I was again working for him, he got his water out of the Nickerson Ditch. It ran through the diggings. Sometimes for a little while

(Testimony of William S. Hendrix.)

he turned it off nights and let the farmers have it. During this period from April, 1913, to December 30th, 1913, the mine was shut down for two weeks, I [218] think, and the water ran continuously right through the mine. Bill Rader was the fellow who shut and opened the gate during that period. I shut it down but never raised it up.

At the time the Nickerson Ditch was built I don't know anything about his getting water from the Snow Ditch. I know there was some talk of some water coming in there once but I don't know when it was and I don't know anything about it. I was living at that time at Paradise, five or six miles below the head-dam of the Nickerson Ditch. I could not testify as to the amount of water flowing below the head-dam of the Nickerson Ditch from 1880 to 1893. From 1893 to 1896 in the winter time there was water went down Little Butte Creek. If the season held up well for water it would continue a while. I should think that the Nickerson Ditch would carry from 1,250 to 1,450 inches, somewhere thereabouts, and there would have to be more water in the creek than the ditch would carry before it would go down the creek.

I know that there was work done on the Nickerson Ditch in 1905 or 1906 by being around there, walking around, going hunting and fishing, and such things as that. I was not up there but a very few times. I remember a man named Murphy who was working with a gang of Chinamen. I saw them somewhere by Mr. Wagstaff's as I passed in there

(Testimony of William S. Hendrix.)

once. From the evidence I saw along the ditch I guess they cleaned it out and dug something out. This cleaning out extended from the Bader Mine clear up the head of the ditch. I could not say as a matter of fact whether they did any blasting in cleaning the ditch or not.

Up to the time I went to work for Mr. Mowry I don't think I was in between the head-dams of the Nickerson and Powers Ditches except only to cross there. I had no business in there but only crossing; going to my work, walking back and forth. [219] I don't think I was in there before for any length of time to see how much there was, but naturally I supposed all the ditches took all the water. They had to have it to irrigate with. After I went to work for Mr. Mowry there was not much water in the creek below. The time we put in the dam there it made 25 or 30 inches of water. Before we put in the head-dam at the Powers Ditch my only recollection as to the amount of water in Little Butte Creek was when we used to run out a car and once in a while the car would go off and run down the hill and in the summer time there was no water in that creek to amount to anything.

I know how much water Mr. Mowry used at the mine when I was working there. In drifting he would only have to use the water for an hour or an hour and a half, to wash out his hopper. I should judge he would need 40 or 50 inches of water. When he was not washing out his hopper I don't see what he would use it for. Since I quit working for him

(Testimony of William S. Hendrix.)

I think I got down to the mine once to get some clothes I had there. I don't remember what was being done at the mine when I was there. From 1897 to 1900 when I was working there, he used the Powers Ditch part of the time, and part of the time he used it from the other. I was not there at the time he was hydraulicking. In 1893 when I first went there the water was running through the lower end of the Powers Ditch but the upper portion was in bad condition. There was practically no ditch or flume there. At that time the Nickerson Ditch got its water out of Little Butte Creek.

“Q. Do you know where the Nickerson Ditch got its water when it was first constructed, in 1888?

A. Out of Little Butte.

Q. Do you know whether any water was dumped into Little Butte Creek above the head-dam of the Nickerson Ditch at that time from any other ditch?

A. I don't know whether it was at that time, [220] or not, but there was some water came in through the Snow Ditch away back. I could not say as to what time that ran.

Q. You would not say that the Snow Ditch water did not come in after the construction of the Nickerson Ditch in 1888, would you?

A. No, I could not.”

At the time the Nickerson Ditch was built I was living at Paradise. I was not at the head-dam when they were building it. I crossed right above it a good many times going along the county road, but I can't recall any one particular time that I was at

(Testimony of William S. Hendrix.)

the head-dam. I have been there a good many times but I can't say any date or any time as to when I was there outside of working on the flumes there at that time. I think the flumes were put in in May, 1907. Whenever I was across there at any time there was no water flowing past the Nickerson Ditch in low-water time.

When I stated that the Nickerson head-dam took all the natural water out of Little Butte Creek I meant the water that naturally makes in Little Butte above the head-dam. There was once when the Magalia mine was running and they dumped some water into the creek there. That came down into the Nickerson Ditch. That was when the Magalia Mine was running, but I don't think it was in 1906. The water dumped in Little Butte Creek by the Snow Ditch I would not call natural water of Little Butte. I could not say as to whether or not any of the Snow Ditch water flowed past the head-dam of the Nickerson Ditch after 1888. There was none at any time I crossed there. I had never been on the Snow Ditch prior to the time I was there fishing, nor have I ever been there since. I do not know when the water ceased to run in the Snow Ditch.

I have been on the Nickerson Ditch before it was cleaned I suppose. I have been on it all along. I didn't pay any particular attention to it at any time. I don't remember the year when it [221] was cleaned. I don't know who the man was that cleaned it, except that I know him when I see him. I saw some Chinamen working along by Wagstaff's and

(Testimony of William S. Hendrix.)

along there; I could not say how many. I have been on and through it lots of times, and afterwards too. I heard them saying and I know the ditch was cleaned out, but I can't tell you as to any time or any fixed place. I know it was cleaned out because the ditch was smooth and cleaned out. Before that time it was full of brush and dirt and rocks. I recall a time when I went up and helped McKenna fix some kind of a post to hold the gate down while I was working for Mr. Mowry. There was water flowing in the Nickerson Ditch at that time. It was not the cleanest at that time,—not as clean as it was after Mr. Murphy got through cleaning it.

During the period from 1893 to 1896 I do not think there was any work done on the ditch of the character of the work that was done in 1906. I don't remember seeing anybody working right along where we were in the period from 1897 to 1900. There was no change in the ditch at that time, over what there had been in 1896, only they threw out rocks and cleaned out the ditch at different places, I noticed as I went along. I don't think the ditch was ever cleaned out as thorough as it was at the time that Murphy and the Chinamen went on the ditch somewhere in 1905 to 1907. Prior to that time it was cleaned here and there, off and on, rocks taken out, but I don't think was given a thorough cleaning as that man gave it. At that time I saw these Chinamen working there somewhere near Wagstaff's. I saw them shoveling out stuff; I saw the boulders; I saw them cleaning the ditch. I saw them from the

(Testimony of William S. Hendrix.)

road where it crosses the ditch. I never went over to see or bother about them, or say anything. I kept right going along the road. That was the only time I ever saw them [222] working on the ditch. I say the ditch was cleaned out at that time because in crossing over it I seen dirt and rocks on the edge showing that it had been shoveled out to the berm of the ditch. I could not say as to whether the dirt was fresh, or anything like that.

Mr. Mowry did not use any more water in the winter time than he did in the summer while I was there. I was not there when he used the big quantity of water. I suppose there was a space above the side boards in the flume where you could put 6-inch boards on top of them. I don't know the amount of lumber that was put in the flume, and I don't know the exact number of days that I myself worked on it, nor do I know the number of days when other men worked on it. There were four of us started in and one quit on the 4th or 5th of July. According to the kind of lumber that was put in I should think the flume and head-dam would cost about \$1,400; I am not an engineer; I did not sit down and figure it out.

After Mowry built the head-dam and flumes in the old Powers Ditch he did not get any water that I remember from the Nickerson that fall. We used it as a reservoir, as a dam for the Mowry mine. I used to continue going up there in the evening and shutting it down and in the morning going down that way and put the water to the mine. Afterwards it was too much for me, and there was an old German lived

(Testimony of William S. Hendrix.)

right across at the Shepherd's Tunnel, I think it was called, and he hired him or got him to go there and shut it down at night and turn it up in the morning. Ragner, I think, was the old man's name. That was in the fall, before the rains came. Mr. Mowry at that time did not have any use for the water at his mine during the night. When I first began to work for him he had use for water at night for running an air blast. [223] The air blast at that time was run day and night. All I saw the Mowry ditch carrying was just what we would raise there and put through there, maybe 30 or 40 or 50 inches of water that we used at that time; just a head to wash with. When I was there in 1913 he was getting his water out of the Nickerson Ditch. I shut the gate on the Nickerson Ditch down but I never opened it up. During the time I worked for Mr. Mowry there was lots of gold taken out of the Bader Mine, but I don't think there is very much gold where they have been working the last few years. 10 or 12 men would never be there but for a short time because the channel would narrow out. I suppose they had as many men there as could work in the channel; sometimes there would be 3, 4, or 5. I worked a gang of men I think for Mr. Mowry some six or eight months at one stretch at one time at gravel. I think there were six men that we worked, with myself. I could not say as to the value of the mine. I have seen some nice clean-ups, but not recently.

Redirect Examination.

After the Mowry flume was built I went away be-

(Testimony of William S. Hendrix.)

fore the next summer, and when I came back the flumes were rotted out or gone. The only time I saw water going through the flume was at the time we finished it that summer or fall, some time in September. At the head at that time, without reservoiring it or anything of that kind, there was from 20 to 30 inches in the creek. At the time I refer to when the portion of the Nickerson dam partly went out one season, I think it was repaired shortly afterwards. I don't recall of ever seeing it when it was out. When they were working the night shift, running the air blast, I think 5 inches would have been all they wanted. I never opened the head-gate in the Nickerson Ditch because the farmers needed the water; I knew they needed it; their crops were burning up for want of water at [224] certain times. The last time I saw a nice clean-up at the mine was quite awhile back when I worked for him there with a crew of men. In 1913 there was nothing at all. In the summer season in all my time I have been in Paradise he used water from the Nickerson Ditch. When the old Jack Powers Ditch was there they used it from that, but that Jack Powers Ditch was virtually before my time of living there, but there is water to this day that comes in it at certain places, and it is distributed out in summer, when they can get it.

The Bader mine took water out of the Nickerson Ditch when I first went there to work and on up to the first time I worked for them they got water. They did not take it out of the same head-gate that they take it out of now.

(Testimony of William S. Hendrix.)

Recross-examination.

There have been two spillways leading to the Bader Mine since my time there; the present one, and the one above it where we used to take the water out. I opened that gate some. John Wagstaff said to me when he was bridge-tender, "Will you be down to that head-gate in the morning?" I said, "Yes." When I came down in the morning he said, "Billy, you are taking more water here than Mowry is paying for," and I said, "You set the gate," and he set the gate. This was some time between 1893 and 1900; I can't say as to the year. There is nothing particular that calls that time to my attention only that he cut the water down; that is all I remember of; they did not have as much water afterwards.

Evidence Introduced by Testimony of George B. Mowry, Called by Plaintiff for Further Cross-examination.

My arrangement with McLaughlin was from 1897 up to the latter part of 1899. I had been using the water out of the Nickerson Ditch from the very first time I commenced work there in 1892, and never paid for it. I used this under permission of Major Jones. [225] After 1899 I used the water through the Thompson Flat Ditch and in 1900 I started hydraulicking and then I made arrangements with Mr. Smith for the rental of the Nickerson Ditch to take the water down to the mine. I never paid the water company for water; I paid them for the use of the ditch; commencing in January, 1901.

(Testimony of George B. Mowry.)

“Q. Will you say you did not pay them \$20 for any purpose, in February, 1899?

A. I don't remember it.

Q. Will you say that in April, 1899, you did not pay Mr. J. A. Wagstaff \$22 for the company?

A. I don't remember ever paying him. I have a distinct recollection that I did not pay him, that I paid him for water—at least, I paid him for the use of the ditch after I was running my water through it.

Q. But never prior to 1901?

A. I don't remember; no, sir.

Q. But you won't swear you did not pay it to him?

A. To the best of my knowledge and belief, I will swear that I did not pay it.

Q. Will you also swear that in May, 1899, you did not pay the water company \$40?

A. Why, sure, I don't think I paid them anything in 1899.

Q. And you never paid the water company or its predecessors in interest any sum until 1901, when you paid them for the use of the ditch?

A. When I paid them for the use of the ditch. I paid them for the use of the ditch until I ceased hydraulicking in 1904.

Q. Will you say that between 1900 and 1904 you did not pay the water company a cent for the use of the water?

A. I paid them for the use of the ditch.

Q. I say will you swear that you did not pay them a cent for the use of the water?

(Testimony of George B. Mowry.)

A. Yes, I will swear I did not pay them for the use of water.

Q. Do you read and write? A. Yes.

Q. Who wrote that (handing witness document)?
[226] A. I did."

I don't remember of ever paying \$20 in February, 1899, nor \$40 in April, 1899, for water, to the company. I paid for the use of the ditch after I was running my water through it. I don't remember of making any payment prior to 1901. I did not pay the water company \$40 in May, 1899. I never paid the water company or its predecessors in interest any money until 1901, when I paid them for the use of the ditch, and I paid them at that time until I ceased hydraulicking in the latter part of 1904. (Plaintiff here introduced in evidence letter identified by the witness as signed by him, and marked Plaintiff's Exhibit 5.)

Plaintiff's Exhibit No. 5—Letter, San Francisco, January 10, 1903, George B. Mowry to Oroville Water Company.

"San Francisco, January 10, 1903.

Oroville Water Company:

Just received your water bills. Inclosed you will find check for amount. Am sorry to have kept you waiting for same but as I have not been to Magalia since last October I did not receive the bills. Please send receipts to me by mail.

Yours truly.

GEORGE B. MOWRY,
226 Bush Street, San Francisco;
In care of M. Kraker."

(Testimony of George B. Mowry.)

WITNESS.—(Continuing.) This bill was for the use of the ditch, and not for water. My arrangement was for the use of the ditch and not for water. I may have put in the word “water” because I did not think. I just put in “water” but it was for the use of the ditch. There would be no difference at all between a bill for the use of water and a bill for the use of the ditch. The receipts they gave me might have been for water, or they might not have been. I think the first receipt I got from Mr. Smith said for the use of the Nickerson Ditch. I never paid any attention— [227] the bills were sent, and the check sent for them. The bills were sent monthly and my checks were sent monthly. The question as to whether the bills were for water or for the ditch never arose between myself and the company. The water company never asked me anything about it; they sent the bills and I sent the money. That is the only explanation that I can make why I referred to the water bills in that letter—only that they sent me the bills and I sent them a check.

Redirect Examination.

The first time I went up there I saw Jones in Oroville and knowing that McLaughlin had the ditch I told him I was going mining. I said, “Can I have some water out of the ditch up there?” and he said, “Yes, we have no use for it; go on and use it.” I did not pay him for it, nor did I pay Mr. McLaughlin anything for it, for either the water or the ditch. I did not lay any claim to the water in Little Butte Creek until 1899 at which time I posted the notice of

(Testimony of George B. Mowry.)

appropriation and built the works I have described, which I used until 1900. In 1900 a slide came and my ditch went out. Then I went to Oroville and made my arrangements with Mr. Smith in regard to taking my water around in there down the Nickerson Ditch. Afterwards we brought a flume through the hill, after we got the slide all washed out, and we used both ditches. During this period from 1901 to 1904 I used the water from the Powers Ditch in the winter time. It was only during the winter that I used the water anyhow, because it was the only time there was water there for hydraulicking.

I don't remember of writing any other letters to the company. I did not even remember writing this letter until it was shown to me. The water company never said anything to me about my appropriation of water in Little Butte Creek. I have no independent recollection concerning the letter than what appears in it. The bills I received from the company were on a regular form that the water company sent out, and they were not typewritten. I don't know of any one else who rented the ditch from them.
[228]

**Evidence Introduced by Testimony of C. M. Hendrix,
Called by Plaintiff.**

My age is forty-three and I am a brother of William Hendrix who has testified here. I follow mining. Magalia has been my home for the past thirty years; I came to Butte County first in 1871. We moved up in the Magalia Ridge in 1876, and I have been in that country practically ever since.

(Testimony of C. M. Hendrix.)

Since 1883 I have been quite familiar with the old Powers or Thompson Flat Ditch. It has always been called the Powers Ditch since I can recall it. The Jack Powers Ditch is what they often call it. I have heard them talking about the ditch as the Walker & Wilson Ditch and the West Ditch. I have heard the old inhabitants speak about it and call it the Walker & Wilson Ditch. There was water in the ditch in 1883. It extended from its intake in Little Butte Creek in a southerly direction towards Thompson Flat or Oroville. I worked on the Nickerson Ditch when it was constructed in 1888 or 1889; I am not sure what year it was. Before the Nickerson Ditch was built the Powers Ditch carried practically all the water in Little Butte Creek along in the summer time.

I worked on the Nickerson Ditch when it was constructed, having a contract for its construction. I could not say exactly what size the ditch was, it has been a good while ago, but I think that 3x3x5 was about the size, as near as I can remember. When I say 3x3x5 I mean 3 feet deep and 3 feet wide on the bottom and 5 feet on the top, where the thorough cut was. I was on Little Butte Creek when they were working on the construction of the head-dam of the Nickerson Ditch.

“What, if anything, happened to the flow in Little Butte in the summer after the Nickerson head-dam was constructed?

A. They were taking all of the water in it out of Butte Creek. [229]

(Testimony of C. M. Hendrix.)

The MASTER.—Q. That is, the Nickerson Ditch took all the water? A. Yes.”

After the Nickerson Ditch was built it took all the water out of Little Butte Creek. In 1901 Charlie Bader and me worked in the bed of the creek during the month of July, about a mile below the Powers head-dam, working some tailings that came down from the Bader Mine, and we put in some boxes there, 12-inch boxes, and we were shoveling in the gravel from the bottom, and there was not water enough in the bed of the creek to wash the gravel that we shoveled in. There has been no water that I ever saw floating down Little Butte Creek [230] below the Nickerson head-gate in the summer time since 1888 and '89, only just what makes in the creek, of course, below the dam. I have been in that stretch of the creek between the Nickerson head-dam and the Powers head-dam a great many times during the summer. In 1902 I was there practically all summer long.

After the Nickerson head-dam was built the Powers head-dam disappeared. I could not say just at what time; I remember being there some time afterwards, but I could not say exactly what year it was in, and there were two men mining where the old head-dam used to be.

I commenced working for Mr. Mowry in the month of August, 1901, on the head-dam of the Powers Ditch. It was partly out there, one of the cribbings on the outside where the ditch came out was partly out. At this time there was about the same amount

(Testimony of C. M. Hendrix.)

of water flowing in Little Butte Creek, as runs there every summer. That is the quantity of water that I have already referred to as the quantity that would be made up from the springs. I worked for Mr. Mowry all of the winter season in 1901 and 1902, the winter season of 1902 and 1903, and 1904 up until March, 1905, and again I went to work for him on the first of April and worked until October, 1911.

While I was there they would commence to work the mine in the fall when it rained, when the winter season set in. Those three years that I worked there we only worked in the winter time. In the summer time me and Mr. Bader, along in the fall, would do repair work, getting things ready for the winter season when the water came. In the fall we would do the work of fixing up the dam and cleaning out the ditches, and working on the head-gate, ready for the winter. There was no summer washings done in the summers of 1901, 1902, 1904 and 1905. Whenever they wanted to irrigate in [231] Paradise we would stop working at the mine. When the irrigating season had started we did not use water for washing in the mine. The Paradise people took the Nickerson Ditch or the upper ditch, but Mr. Mowry's ditch would not make water enough to wash with. It would take somewhere between 1,000 and 1,200 inches to wash with. I mean by washing, ground-sluicing. If we would be drift mining,—have just gravel-boxes, it would take practically about 50 inches. To-day they are drift mining. When I went up there in 1911 they drifted underground and

(Testimony of C. M. Hendrix.)

we carried the gravel out and dumped it into a bin, and then washed it through small boxes. When I worked there first we had boxes of 40 inches and we would run rocks through. We would start them in the flume and have water enough to wash them out. Of course if they were very large big chunks we would blast them up and run them out. With ground-sluicing, they just turn the water on and washed the cut through the mine and everything was cleaned out. They did not use the giant for that; no giant was used while I was there. I don't know what they are doing to-day as I haven't been there since a year ago last month.

In ground-sluicing you have all this big heavy stuff; rocks and stumps and stuff to ground-sluice out, and you start at the surface and wash a cut right through the mountain; everything that is in there; rocks 2½ or 3 feet big, that you could put in the flume if you have water enough to wash them through. In drift mining, on the other hand, you just cut out the grave; what is called the pay gravel, and dump it into a bin, and there is no use for the water except to wash the gravel through it. When I was at the Bader Mine in the early years the work was ground-sluicing. During the winter season at that time, about the least we can do much with was 1,000 inches; of course, the more water, the better it is. We could get along with a little less than that, [232] but we could not work as fast. The material all came down and was put into very large boxes, and run through. In later years the method was to

(Testimony of C. M. Hendrix.)

drift and bring the gravel out in cars and dump it into a hopper and then it through small boxes, and the sluice-head would be something like 50 inches. The time that they were ground-sluicing was in March, I think, 1905, when they started a tunnel. I was not on the ground after that again until 1911 when I worked from April to October. During this latter time when we were taking out gravel the water was used an hour and a half a day, generally right after noon. During the remainder of the time it ran through the mine.

In 1911 my attention was called one day to a notice on the spillway through which the Bader people get water from the Nickerson Ditch. I read it; I could not say exactly the words that was on it, but it was forbidding anyone taking water out of the ditch, and was signed by the Oroville Water people.

“Q. You have been familiar with the Nickerson Ditch, have you, Mr. Hendrix, since its construction?

A. Yes, sir, I have been right there practically all the time in that neighborhood.

Q. Has the portion of the ditch from Little Butte to the spillway through which the Bader people get their water been enlarged to your knowledge?

A. Well, from the north end of the Bader Mine down the ditch I think has been enlarged, to the best of my knowledge, looking at it, and walking over it, it has either been enlarged or the banks have been sloped back further; I never measured it; I cannot say whether it is any wider now than it was in the first place, but the ditch from there looked further

(Testimony of C. M. Hendrix.)

sloped back. Above that, in the hard section, where the rocky section is and the banks are perpendicular on the sides, hard rock, I cannot see any change in it just from walking over it. [233]

Q. Such enlargement, as you say, would you say that it had increased the capacity beyond the original capacity or not?

Mr. CROSS.—It has not been shown that he knows what the original capacity was.

Mr. ORRICK.—He said he built it.

A. Below the hard rock, I think it has.”

The country on Little Butte Creek between the place where the Nickerson Ditch head-dam is and the place where the old Powers Ditch head-dam was, is pretty rough; it is a canyon, a rugged gorge or canyon; a pretty rough steep place. There are no regular trails through there through which packing is done.

Cross-examination.

There is a pipe-bridge crossing the creek about 1,000 feet below the head-dam of the Nickerson Ditch. This is called the Cherokee Ditch,—the pipe-line acting as a syphon across the creek. This is the Pacific Gas & Electric Company's syphon, and you can cross it on foot, but not with a pack-horse.

The Bader Company was getting water out of both ditches, the Nickerson and the Powers Ditch, from 1901 to the spring of 1904. During the summer season during that time there was nothing doing only just as I say, just before the winter season would set in, we would do repair work. I was not there in

(Testimony of C. M. Hendrix.)

the summer of 1904, until along in the fall, September or October. I started to work for Mr. Mowry in August, 1901, and quit about May, 1902. Then I started to work again in the fall of 1902,—about September,—and worked until about May, 1903. I then started to work again in October, 1904, and left in March, 1905. I again worked for him from about the 1st of April until the 9th or 10th of October, 1911. During the time I worked for him last he was drift mining; in the earlier periods we were drifting tunnels to carry water to the mine in the winter season from the Powers Ditch. [234]

In 1911 the water was taken out of the Nickerson Ditch as was also true in September, 1913. Charley Bader, the boy, always raised the gate every morning when I was working there. I used to walk home with him at night. He would go up the trail with me and go back and close the gate, and then he would catch up with me on the ditch. In the morning as we went down when he opened the gate I would see the water going down the pipe-line immediately. In 1911 I should judge they were using between 40 and 50 inches sluicing. I never measured it. The spillway at the Nickerson Ditch leading into the Bader mining property could take any amount of water that was desired. They could take all of the water out of the ditch that they wanted to if it was a big spillway. The time that I refer to when I was there in September, 1913, was when I was at the mine four different days for the purpose of sharpening some picks and drills. I was not working for

(Testimony of C. M. Hendrix.)

the Bader Company at that time. I was only there half or three-quarters of an hour each day and I don't know anything about the number of hours Mr. Mowry was then washing gravel.

From April, 1911, to October, 1911, while I was there, the water was being used only an hour or an hour and a half a day, the time it would take to wash out the gravel that we got out. Water was needed also in cleaning up. This would be every time the gravel was washed down, taking about 15 minutes. If I remember right I think there was five 16-foot boxes of riffles. He would take up probably one or two riffles where the gold was picked up. I don't remember of seeing all the riffles taken up at one time. The refuse was dumped on the ground. On the upper tunnel there was about a 20-foot dump. On the lower tunnel the waste was used to make a reservoir. Whenever we had a load of gravel it would be put into the hopper, and when we had a load of [235] waste that went on the dump. At no time while I was there from April to October, 1911, was any waste dumped into the 40-inch flume. In the winter of 1901 and 1902 when I was working for the Bader Company water was used out of the Powers Ditch. This water was used up to May, 1902. I could not say how much water ran through there at that time. We ran the ditch just as far as it would carry. We used to talk about it carrying about 400 inches. I think that is what it was carrying when it was right full. From September, 1902, to May, 1903, we carried about the same quantity of water

(Testimony of C. M. Hendrix.)

through the Powers Ditch and the same is true when I worked in 1904 and 1905. During this same time he was using water from the Nickerson Ditch using the whole ditch excepting in 1904 and 5. He got the capacity of the Nickerson Ditch during the winter season at that time, or at least that proportion of the capacity of the Nickerson Ditch that would run through a tunnel between the Nickerson Ditch and the Powers Ditch. I do not know whether Mr. Mowry did any ground-sluicing after March, 1905. I was not there and did not observe. During the time I was there from 1901 to 1905 I never saw him use a giant.

I have a locatioin over past Butte Creek upon which I have been doing assessment work. In doing that assessment work we have to cross Little Butte Creek. The assessment work is generally done in the fall and we crossed the creek at Shepherd's tunnel, a trail crossing the creek below the Powers head-dam, or on the pipe bridge above. If it was after the rains came I would cross it on the pipe bridge because I could not get across it below, but if it was before the rains came I would go across there. I have been hunting and fishing in Little Butte Creek, and during the summer season I have never seen any water there to speak of. There is always a certain amount of water flowing there, practically 35 or 40 [236] inches, and there are pools in there, 8 or 10 feet deep, where the water stands. I have been fishing above the Powers head-dam and below the Nickerson head-dam in the summer time. I was

(Testimony of C. M. Hendrix.)

raised within a mile of the Nickerson Ditch, and I have hunted and fished and been across there off and on at all times of the year. I had a contract for digging 20 rods of the Nickerson Ditch just south of the Bader Mining property on what is called the Slocum Place. It is probably a quarter of a mile south of the Bader Mine. Before this I used to be up on the upper part of my ditch when my stepfather was working there building the rock walls in the hard rock. He built at one point a rock wall clear around the point on the lower side of the ditch for a distance of 120 or 140 feet. The upper part of the ditch was solid rock.

I know the time when Mowry was putting in the head-dam on the Powers Ditch though I was not there when it was put in. I have been down there several times since then and have seen water flowing through the flume and ditch which he constructed. After he constructed it the flume was 2 feet wide and 2 feet high. I think the ditch was a little larger because the flumes would be full when the ditch would not. The grade is not very even. In some places it has a heavy grade and other places not so much. I saw water in the flume in 1900 some time in the spring. I never saw the flume dry during 1900. When I went there in 1901 I helped repair the head-dam of the ditch; one of the cribbings had rotted out and a hole had been torn through the dam and all the water in the creek was running through this hole. There were five men working there I think for 10 or

(Testimony of C. M. Hendrix.)

12 days. There was not water enough in the creek to bother us and we went down and put the holes in and filled in with rock. I could not say how wide or how deep the stream was that was flowing through the hole in the dam, but we were working around in it without gum boots. This was in August, 1901. As we got the dam finished we tried to calk it and get the [237] water up into the ditch, but we could not do it until it rained.

While I was working at the Bader Mine both the Nickerson Ditch and the Powers Ditch would be running practically full in the spring time when I quit working. There was not water enough in the Powers Ditch after May to wash the big boulders out. When we were ground sluicing it took 1,000 to 1,200 inches of water, and we could have used more if we could have gotten it. I am familiar with hydraulicking and it would take about the same amount of water as we were using in ground-sluicing at that time if Mr. Mowry had been hydraulicking.

In hydraulicking you don't have to wash the debris away. It could be carted away.

From the north end of the Bader Mine property south, the Nickerson Ditch looked as if it had been enlarged. From the north line of the Bader Mine up toward the gate of the ditch I could not see where there had been any particular change in the ditch for it ran there through the hard section.

“Mr. CROSS.—Q. What would you say, Mr. Hendrix, in respect to the increase of the capacity of the

(Testimony of C. M. Hendrix.)

ditch, if anything, through the Bader Mining property? A. It looks as though the ditch is larger.

The MASTER.—Q. From the north end down?

A. From the north end down, going down, from there it is practically all soft ground.”

At the time I referred to when I was working for Mr. Mowry in the early years we were using all the water from the Nickerson Ditch if we were taking any water at all. Sometimes there would be probably an hour or two hours at a time when we were blasing and breaking down the rocks that we would shut the gate down and let the water go past but when we were making use of the water we used it all.

[238]

Redirect Examination.

From a point about a quarter of a mile above the spillway, the north line of the Bader Mine, the Nickerson Ditch looks as though it is either cleaned good or been washed; I can't say, I never measured it. North of that point I never noticed any signs of enlargement. Rock walls are there practically the same as they always have been. There was no cross-gate put in the Nickerson Ditch where the Bader spillway is while I was there nor any as late as October, 1911, when I left. There used to be some boards. We used to take a board and drop it down in there; that would answer practically the same purpose; sometimes it would be a 4-inch and sometimes a 6-inch board, depending upon how much water we wanted to use. There were boxes clear across the

(Testimony of C. M. Hendrix.)

ditch to hold these boards. We done that all the time when we were washing the banks down, and we used the whole Nickerson Ditch. When the ditch was full coming down it would be almost impossible to turn it down at that angle without dropping a board or something to turn it in, but there never was any regular gate used that I remember of. I have been there and turned it on myself. You would not put the board in the same if the water was high. In the winter sometimes it was two-thirds full and sometimes half full, and you would have to put that all in to turn it all down. This same contrivance was used when I was there between April 1st and October, 1911. They would raise the gate up and about half would go down the ditch and about half down the spillway. When I was there in 1911 I did not see this contrivance placed across the ditch in such a way as to carry all the water out of the Nickerson Ditch down to the Bader Mine.

In 1901 they could not get any water into the flume; the dam was out. In 1902 Mr. Bader and I tried to keep the water in the greater part of the summer to keep the flume from [239] going to pieces, but we could not keep it in. The dam leaked of course some and the water went through. The dam is about 14 or 15 feet high. The flumes went dry every year.

The flume of the Powers Ditch in 1902 was in pretty fair condition when we started to work. It was dry and leaked, as any flume will do, if the water

(Testimony of C. M. Hendrix.)

is out. The dam leaked some and we could not get the water through the ditch.

During the time I was working for the Bader Mine we took all of the water out of the Nickerson Ditch in the winter time, but in the summer time,—the summer that I worked there in 1911,—I should judge we were taking about half; raised this gate up and about half would go each way. Without putting in the boards across the ditch the Mowry spillway would take about half of the water in the ditch. The cross-gate was not used in the summer. [240]

**Evidence Introduced by Testimony of A. A. Davis,
Called by Plaintiff.**

I am fifty-two years old and am superintendent for the Oro Electric Corporation, and was also employed in that capacity by the Oro Water, Light & Power Company, its predecessor. I began my employment on March 1st, 1908. Before that time I was employed by the Pacific Gas & Electric Company, being stationed from the years 1905 to 1908 at De Sabla, about five miles west of Magalia.

When I was in the employ of the Pacific Gas & Electric Company and stationed at De Sabla, I was on Little Butte Creek below the Nickerson head-dam many times. The only water that was flowing in the creek at that point during the summer time was that which seeped through the dam, very little. I was familiar with the section of Little Butte Creek between the Nickerson dam and the pipe-line several

(Testimony of A. A. Davis.)

hundred feet below, on a portion of the old Cherokee Ditch.

The use made by the water company of the Nickerson Ditch, is as follows: In winter after the irrigation season we take the water over to Kunkle Reservoir and mingle it with the general water system of our company, with the Miocene waters in the Kunkle Reservoir. During the summer months we devote as much water to the Paradise irrigation as they can consume, and as the water falls in Little Butte Creek we use it all in the Paradise irrigation district, and there is not enough to go around. The irrigation consumers on the ditch number between 50 and 60. During this last summer the crops suffered from the want of water. They have not had water for the greater portion of the latter part of the summer, and have been almost entirely deprived of it. The effect has been of keeping the fruit from maturing and keeping the gardens from being productive of berries and crops generally. We have had many requests [241] from irrigators for water.

There has never been any enlargement of the Nickerson Ditch since I went there in 1908, nor was there an enlargement near the portion I was familiar with, the upper end, at any time since I first went up there, which was 1905. I was in the employment of the company in March, 1908.

I did not learn at any time during 1908 that the Bader people were taking water. It first came to my attention in the early part of the season of 1909.

(Testimony of A. A. Davis.)

My recollection is that the ditch tender called my attention to it, or the ditch foreman. I went over the ditch on a trip of inspection with my foreman, Mr. Biek. I saw Ed Bishop, I believe his name is, at the gate leading to the Bader Mine, and he was taking water. We had some talk about it and we told him he had better close the gate and leave that alone until they had made arrangements with us for water. We did not know anything about supplying any water to the Bader people. Mr. Bishop closed the gate while I was there. I have seen the head-gate open a great many times since that date and whenever I went along when the gate was open, with one exception, I shut it, and I have posted notices that I have written on pages out of my book a number of times at the gate notifying the people not to interfere with the gate or take water from it. I have closed the spillway quite frequently. There have been many times that I have been up to the spillway and have seen it closed. We had two different men on two different occasions at the gate. On June 21st, 1912, Mr. McAtte was sent up there. We wanted to try to prevent the water from being taken so that we could get it to our customers in Paradise. I will state that there had been a number of bills sent to the Bader people previous to that time which they had refused to pay, and we were advised by our attorneys to take steps to try to prevent the taking of water. I was not at the spillway at any time [242] while Mr. McAtte was stationed there. He remained

(Testimony of A. A. Davis.)

there several days, somewhere about a week, as I remember it. August 22d, 1912, was the first time I had any knowledge that they were taking all the water out of the Nickerson Ditch at any time. I never saw any cross-gate at the Mowry spillway before this date. The effect of placing it there was that they thereupon took all the water from the ditch during the summer months during the low season of the water. That had not been done before that date to my knowledge.

Bills were sent to the Bader Company or to Mr. Mowry but were not paid. I instructed both Mr. Biek and Mr. Lincoln to try to prevent them from taking the water. They used every reasonable method they could to prevent it. Mr. McAtte was put on the job for the same reason.

I was down to the Bader Mine during the month of September this year. I stayed around inside of the mine for some little time, I guess probably half an hour or so. I did not see anything that indicated any necessity for the amount of water they were running. I saw a little gravel in the ground-sluice, and only a little. I did not go down close to it. I saw only one man working, apparently washing gravel, as nearly as I could tell. I would estimate that something over 100 miner's inches of water was running through the mine at that time. The only water that was proceeding down the Nickerson Ditch to the Paradise people was a little that leaked by a cross-gate they had in there.

(Testimony of A. A. Davis.)

The water that runs down the Nickerson Ditch in winter is used in the operation of the company as well as that brought down in summer. In winter the water, after passing out of the Nickerson Ditch, and finally reaching Kunkle Reservoir, is used in generating power and also to help supply the City of Oroville and the surroundings as may be needed. [243]

I never stated to Mr. Mowry that I had come to serve an injunction. In discussing the matter of taking the water I told him to let the water alone or we would have to serve an injunction on him; that is as near as I can remember the conversation. There was quite a good deal of it, but I don't remember much of the detail.

I know Samuel W. Irwin. I don't know exactly what his official title was but he was the equivalent of either auditor or chief accountant of the Oro Water, Light & Power Company, and held that position on February 14th, 1908. At that time I had nothing to do with the general auditing or bookkeeping department of the company. I did not, as a general rule, collect any of the bills of the company; it was part of the ditch tender's duty to do that. The ditch tenders were under my control, and it had always been the arrangement that they should collect the bills.

I have no recollection of the users on the ditch in 1908. 1909 was the first time I had any knowledge of any water being used along the ditch other than Mrs. Slocum on the Slocum place, who had a little water right of 10 or 15 inches. As far as I know the same parties were using the water in 1910. The

(Testimony of A. A. Davis.)

Bader people took some water out. The same is true of 1911 and 1912. I want to make it plain, however, that any water that was taken out by the Bader people in 1911, 1912, 1913 and 1914 was taken out under protest.

“Mr. CROSS.—Q. And the same people took water in 1912, 1913 and 1914, right up to the date of this trial? A. Yes, sir.

Q. The Bader people and the Slocum people?

A. Well, the Slocums took enough water to keep their trees alive.

Q. That was true in 1909 and in each year since; is that right? A. I think I have so stated. [244]

Q. Do you know of any water being taken out of that ditch by the Bader people in 1908? A. I do not.”

I know a man named Kalemborn; he is an electrical and mechanical engineer, and was employed by the Oro Electric Corporation, at one time, working in the San Francisco office. When I was working for the Pacific Gas & Electric Company I crossed the pipe line below the Nickerson head-dam many times. I don't know just how often I crossed it, but I would be along there several times during one month and then perhaps I would not be along there again for a couple of months, just according to what we had to do; there was no regular way for making the trips, nor any regular interval between them.

When I first went in the employ of the company in 1908 I had no knowledge that the Bader people would

(Testimony of A. A. Davis.)

not pay for whatever water they took. During the first couple of years of my stay up there I did not know anything of these old conditions. I had no history of the local situation at all.

“Q. Did you ever learn that they took water in 1908? A. I did not learn it in 1908.

Q. When did you learn it?

A. In 1909. I only got it by hearsay, that they took a little water in 1908, an inconsequential amount.

Q. Who told you that?

A. It came to me third hand, through the ditch tender and ditch foreman.

Q. What was the ditch tender's name?

A. We had two that year, a man named Merrill and a man named Harris.

Q. Did not your superintendent of ditches tell you, in 1908, that the Bader Mining people were taking water?

A. He told me in 1909 that they had taken a little the year before.

Q. Did he tell you how much they had taken?

A. No, because he didn't know, so he stated.

[245]

Q. Who was that superintendent, Mr. Bickford?

A. Mr. Bickford.

The time I referred to of seeing Mr. Bishop at the Bader spillway was in 1909. We went up to see about a rumor we had heard that there was water being taken out of the spillway. I did not see a cross-gate across the ditch at that time and saw the

(Testimony of A. A. Davis.)

spillway leading out of the ditch to the Bader Mine. We had quite a long conversation with Bishop but I could not begin to repeat it all; we just talked general conditions. I told him to let the water run and if they wanted water to make arrangements for it. He said Mr. Mowry ordered him to take water. I did not go down to see Mr. Mowry; that was no part of my duty at all; people generally came to see us when they want to buy water.

I never tore up the spillway leading out of the ditch to the Bader Mine, nor ever saw a cross-gate in there until 1912. We took a cross-gate out of the ditch at that time. I have seen it a number of times there since. We have always taken it out promptly whenever I have been there. I did not consider it necessary to take the spillway gate out; that was a matter we discussed with our attorneys and we were somewhat advised by them. I don't remember of ever having written any letter to Mowry or to the Bader Company advising them to keep the gate shut or that they would be dealt with according to law, nor do I recall of having applied for a warrant for the arrest of anyone connected with the Bader Company for interfering with the ditch. I was willing it should be done, and wanted it done, because I wanted the matter settled, and talked it over with our local attorney several times. All I know about McAtty's stay on the ditch was what he told me and others told me. I hired him to go up there with instructions to try and keep the gate closed. I told him before

(Testimony of A. A. Davis.)

he went that I did not want him to resort to violence or do anything that would get any serious trouble started, and the next day I went to [246] San Francisco. Mr. Biek, as I recall, took him up there.

The bills that were sent to the Bader Company and were not paid were for the use of water during the 1909 or 1910. I don't remember the exact dates. I think they began to take water early in the summer of 1909. I don't think they had been taking water in the spring of 1909 and the winter of 1908. If they did, as I stated before, I did not know about it. When I visited the mine in 1909 I saw water running through the sluice-boxes. I was a little bit curious to know what they were doing with the water when I found them taking it. I went through a portion of the mine and inside of the sluice-boxes about 100 or 150 feet maybe. I did not go to the mouth of the tunnel. The only other time I remember going was in 1914 in September. I did not go any closer to the mine because it is a pretty hard climb up there. We stayed up on top of the ridge and looked down. There was one man washing gravel but we were not close enough to distinguish who he was. I would not say there were no other men working in the mine at the time.

The irrigating begins according to the season; it might begin earlier or later, according to how the spring rains leave the ground; ordinarily it closes in September and generally begins in May. After the rainy period sets in we carry the ditch as far as

(Testimony of A. A. Davis.)

we can, taking the water from the Kunkle Reservoir. It is only used for power and light and domestic service. I have seen the ditch running practically full in winter. I don't run the ditches up to the top of the banks if I can help it. It is not true that the older a ditch becomes the higher you can run the water on the banks. Banks wear down in the course of time and the course of use, and also by erosion.

Redirect Examination.

When I went up there in 1908 I found the winter [247] water was being used through the Nickerson Ditch into the Knukle Reservoir, and that use has continued during the winter ever since. Until the Bader people put in the cross-gate in 1912 they could not have taken all the water.

Recross-examination.

I have noticed slots on the side of the boxes of the spillway where boards could be slid down. Boards could be put down there and the water stopped going down the ditch. They have always been there to my recollection. The box that the Bader spillway is taken out of is a short section of what we call a flume, and there was an arrangement there so that all the water could be taken out.

Redirect Examination.

We could utilize a normal ditch-head of the Nickerson Ditch except during the flood times. When there is no superficial water coming in from the local run-off of the ravine leading to Kunkle Reservoir

(Testimony of D. B. North.)

we can use the normal ditch supply economically and do use it so. We have always looked upon the normal supply from the Nickerson Ditch as something under 1500 inches; that is the basis of our calculation in our regular work. I am speaking of the winter supply.

**Evidence Introduced by Testimony of D. B. North,
Recalled by Plaintiff for Further Cross-
examination.**

I was familiar with the Powers Ditch before the Nickerson Ditch was built. The Powers Ditch was built a long time before I went over that part of the country. It was an old ditch when I went there which I think, as near as I can remember, was somewhere about 182. It was called by several different names; the West Ditch, the old Powers Ditch, and later on as the Oroville Water Company's Ditch, but Fogg seemed to be at the head of it. [248]

“Q. About the water that came down Little Butte Creek in the summer time before the Nickerson Ditch was built, where did that water go?

A. Well, the water that rightly belonged to Little Butte Creek was taken up by the Powers Ditch, or whatever you might call it, and of course when they were dumping the Snow Ditch in there above, that was taken by the head-dam.

Q. That was taken past the Powers head-dam?

A. Past the Powers head-dam and used there at the mine.

Q. What mine? A. The Mineral Slide Mine.

Q. But the natural flow of Little Butte in the sum-

(Testimony of D. B. North.)

mer time, if I understand you correctly, all went down the Powers Ditch?

A. The Powers Ditch, in low water, in the dry season."

The Powers Ditch that I referred to was known as Jack Powers; I think old Pete Powers was the same person. I think it was in the latter part of the 70's that Powers had the ditch. When he first got it I think he used it for mining purposes in and around Oroville and afterwards supplied the town of Oroville out of it.

Further Redirect Examination.

"Mr. CROSS.—Q. You said something about the waters that rightly belong to Little Butte Creek; do you distinguish that water from the water dumped in by the Snow Ditch?

A. Yes; that is, the old Powers Ditch was entitled to all the water coming down Little Butte Creek, the natural water source of Little Butte Creek. Of course, the water we turned in out of the Snow Ditch we were entitled to take out by the head-dam.

Q. You took it out by the head-dam and used it down at the Mineral Slide Mine? A. Yes, sir.

Q. At the time that the Nickerson Ditch was built in 1888, Nickerson owned the Snow Ditch and the Mineral Slide Mine, did he not?

A. Yes, sir. [249]

Q. And he built this ditch so as to get a better head of water at the mine?

A. No, the ditch was not built for that purpose.

Q. What purpose was it built for, if you know?

(Testimony of D. B. North.)

A. We had more water than we had any use for at the mine and I suggested the idea to Mr. Nickerson to bond a lot of land on the ridge there and construct this ditch to bring the water out there for irrigating purposes.

Q. What water do you mean?

A. The water that we brought through the Snow Ditch and dumped into the head of Little Butte Creek and then would catch it up in the ditch on there."

At the time when the Nickerson Ditch was completed there was more water in the creek than what the Powers Ditch could handle and during such times as that we used the water out of Little Butte Creek in the early spring before we had to get water from the upper ditch, from the Snow Ditch. The Ditch was completed in the spring of 1889 and I went to work for McLaughlin in July, 1890. As a general rule at that time when we took what water we wanted from the Ditch up there there was water enough to fill their ditch and some left. Of course when you come to the dry season the old Powers Ditch would carry all the water that was in Little Butte Creek,—all the natural water. I was only there one summer that the Nickerson Ditch was built and we did not have much use for water at that time; that is, there were no ranches by to amount to anything; they had not got started, the water was still running through the old Powers Ditch.

I think there was a spillway in the Nickerson Ditch just after it left the head-gate so in case of a

(Testimony of D. B. North.)

heavy storm and pressure in your head-gate water is forced into the ditch and unless you have a spillway to throw the water out you will increase the flow in the ditch and break the ditch in some places. [250]

The witness was thereupon recalled by defendant:

I can't remember positively the size of the flumes that were originally put in the Nickerson Ditch, but it seems to me they were in the neighborhood of about four feet or four feet and a half, or something like that, and three feet deep.

Further Cross-examination.

“Mr. ORRICK.—Q. You testified the other day, I believe, that the ditch as constructed was approximately of the dimensions of 3x3x5? A. Yes, sir.

Q. And counsel on the other side raised the question whether that 3 feet that you mentioned for the depth of the ditch was 3 feet below the thorough cut, or was three feet after you measured with the dirt piled up on the bank; do you get my idea?

A. Yes.

Q. Which was it?

A. In making the survey the grade pegs are always drove down level with the surface of the ground on the lower side, and the measurement was from the top of that grade peg 3 feet perpendicularly down to the bottom of the ditch. The measurement across was from the grade peg on the horizontal line to the other bank, 5 feet.”

Further Redirect Examination.

The Snow Ditch was built before my time. I

(Testimony of D. B. North.)

have some notes at home where Charlie Slocum was there in 1868 and the head-dam was in then. I do not know positively when it went out of use. I know that when I was superintendent for Mr. Nickerson at that time we ran water through it. I was at the Mineral Slide Mine for about six years altogether; first when the Mineral Slide Mining Company, a Boston company, and then afterwards under Mr. Nickerson, who bought the property. He was one of the original owners as a stockholder. During my time there I had the ditch repaired up every year and the water put in. I know that in 1888 the ditch was in and was running water, and we ran water through it. I was there for [251] Nickerson in 1889 but I am not positive whether we put the water through it that year or not. The Snow Ditch would carry in the neighborhood of 1,500 inches, I should judge. At the time we used it it was in the summer time when the water began to get low, and in the low time of the season there was not water enough in the west branch to begin to fill it. We would have, I suppose, early in the spring, in the neighborhood of 1,000 inches; later on in the dry season it would go down as low as 350 or 400 inches.

I left Nickerson about the last of June or first of July, 1890, and went to work for McLaughlin on his reconstruction of the Miocene or Thompson Flat Ditch. McLaughlin bought the Nickerson Ditch some time in July, 1890. He bought Nickerson out. They figured then that they would take the Thompson Flat Ditch through the Nickerson Ditch, instead

(Testimony of D. B. North.)

of repairing up the old Powers Ditch on account of being so many flumes along on that side. They bought the Nickerson Ditch in order to avoid the expense of repairing the old Powers Ditch. I don't know who owned the Powers Ditch at that time. Nickerson and McLaughlin intended to abandon the Thompson Flat Ditch from where it came out on to the ridge up to the head-dam, and use the Nickerson Ditch from the head-dam down on to the ridge. When they abandoned it and turned all the water through the Nickerson Ditch, I don't know.

**Evidence Introduced by Testimony of C. M. Hendrix,
Recalled for Further Direct Examination.**

There is a spillway in the Nickerson Ditch near the head-dam in the neighborhood of between 300 and 400 feet from the head, I think. This spillway was put in there for a sand gate more than anything else. The ditch there is in the neighborhood of 10 feet deep, and it is graded from downstream back. I have been there many times when I was working for Mr. Mowry and opened it to [253] let the sand out. When the gate is open it washes the sand and everything out from the waste-gate. In the winter time they regulate the water there. If there is an extra big head of water goes down it goes over the dam.

The point between the Nickerson head-dam and the Powers Ditch where I testified there was no water in the summer, was below this spillway on the creek. I don't know whether this spillway is open

(Testimony of C. M. Hendrix.)

or closed in summer. I don't know that I was ever up there in the summer time.

Cross-examination.

The amount of water which goes down the Nickerson Ditch is governed by regulating the gate in the spillway and not by the gate at the head of the ditch. When I was working at the Bader Mine that is always where I went to regulate the ditch in high or low water.

**Evidence Introduced by Testimony of A. A. Davis,
Recalled for Further Direct Examination.**

The spillway in the Nickerson Ditch below the head-dam is used in the winter during the periods of high water, principally for regulating the flow in the ditch. During the irrigating season it is hoisted up to let the water run through the ditch. There is no need of it in the summer because there is not enough water going down to fill the ditch. The purpose of it is twofold; a regulating-gate and a sand-gate, in order to sluice the sand out that would ordinarily flow down the ditch.

**Evidence Introduced by Testimony of William
Durbrow, Recalled for Further Direct Examination.**

I have here the journal, cash-book and consumers ledger of the Oroville Water Company, regularly kept in the office of that company. I have also a consumers ledger covering the Nickerson Ditch for some years preceding the time shown in the other consumers [254] ledger. The two do not connect

(Testimony of William Durbrow.)

up; that is, the earlier book does not connect up with 1904, when the latter begins. As far as the Nickerson Ditch is concerned, these books show all sales on the Nickerson Ditch from January 1st, 1902, to January 1st, 1904.

From these books the following entries appear as to collections on the Nickerson Ditch:

January, 1902, Nickerson Ditch collections, \$50.00—
Mining;

February, 1902, Nickerson Ditch collections, \$50.00—
Mining;

March, 1902, Nickerson Ditch collections, \$50.00—
Mining;

April, 1902, Nickerson Ditch collections, \$50.00—
Mining;

May, 1902, Nickerson Ditch collections, \$50.00—
Irrigation;

June, 1902, Nickerson Ditch collections, \$25.00—
Mining;

December, 1902, Nickerson Ditch collections, \$50.00—
Mining;

January, 1903, Nickerson Ditch collections, \$50.00—
Mining;

February, 1903, Nickerson Ditch collections, \$50.00—
Mining;

March, 1903, Nickerson Ditch collections, \$50.00—
Mining;

April, 1903, Nickerson Ditch collections, \$50.00—
Mining;

May, 1903, Nickerson Ditch collections, \$50.00—
Mining;

(Testimony of William Durbrow.)

December, 1903, Nickerson Ditch collections, \$50.00—

Mining;

“George B. Mowry, total of new charges made during the month.”

January, 1904, Nickerson Ditch, G. B. Mowry, \$65.00

—Mining;

February, 1904, Nickerson Ditch, G. B. Mowry, \$75.00

—Mining;

March, 1904, Nickerson Ditch, G. B. Mowry, \$75.00

—Mining;

April, 1904, Nickerson Ditch, \$75.00—Mining; total

of current monthly charges May in

advance as shown on rate books at

Oroville, April 1st.”

May, 1904, Nickerson Ditch, G. B. Mowry, \$75.00—

total of current monthly charges for

May as shown on rate book May 1st.

June, 1904, Nickerson Ditch collections, credit, \$50.40

—Mining \$37.50; irrigation \$12.90.

September, 1905, Nickerson Ditch collections, \$114.90.

The item “May, 1902, Nickerson Ditch collections, \$50.00, irrigation” is evidently an error because there is a half month in June in mining and no irrigation in June at all, and therefore there could not have been any irrigation in May. The word “irrigation” should be “mining.” The month in the entries indicates to me that the charge is made for the business of that month; in other words, it is the calculation for the water sold during that month. The books show for the item of September, 1905, a charge for the month of \$114.90. I have written in recently

(Testimony of William Durbrow.)

myself, "\$75.00 for Bader Mine." I found the report from a ditch-tender [255] to show what made up the total amount, and while the entry does not show the \$75 as coming from the Bader Mine, it does show from the original report. The payment made in September, of \$75, is a delinquent bill for water used the previous winter. It is an adjustment; such an adjustment as a ditch-tender would make for water used that winter. Evidently I had written him that he should collect the money from the Bader Mine, and he made this adjustment and collected \$75. The books do not show when the water was used, but show the date of payments. For January, 1904, our books show a delinquent charge against the Bader Gold Mining Company amounting to \$75, making a total charge the first of the month of \$150, and show that both charges were paid during that month, which balanced the account. For September, 1905, we have to look under H. C. Murphy. He was the ditch-tender at that time. Page 19, No. 29, shows a charge for that month of \$114.90. \$75 of this amount was for the Bader Mine. The reason I happen to know that this \$75 was collected in that month from the Bader Mine is because of a report from the ditch-tender, H. E. Murphy.

Said report was thereupon introduced in evidence and was in the words and figures following:

"Paradise, September 17, 1905.

Mr. Durbrow:

Dear Sir: I have seen Mr. Mowry and had quite a talk with him. He paid me \$75 and claimed he did

(Testimony of William Durbrow.)

no hydraulic mining last winter but did ground sluicing about one month for the purpose of clearing away the slide, and has been tunneling ever since. He informed me he would write you to that effect and was willing to settle his bills, whatever they were. He also claimed Mr. Bader notified you that they were not using the water. Kindly let me know if I can sell them 5 inches of water for water blast tunnel, [256] and I will see that this is collected.

Very sincerely,

H. E. MURPHY."

Murphy is dead. This is in his handwriting. In my hand there appears on the report "Filed, Nickerson Ditch." This \$75 was a delinquent bill for water used the previous winter. It is an adjustment such as the ditch-tender could make for water used that winter. Evidently I had written him that he should collect the money from the Bader Mine, and he made this adjustment and collected \$75.

There were no payments made by Mr. Mowry or the Bader Company to my knowledge subsequent to September, 1905. I have been unable to find any in the records.

I don't remember the exact date when the water was turned into the Kunkle Reservoir but it was probably in the early spring of 1907.

There is no ledger account showing the account with the Bader Gold Mining Company. There is nothing in the books that I know of which shows the opening of the Mowry or Bader account; 1902 is the earliest report I have.

(Testimony of William Durbrow.)

There is an item on page 3 of the Journal as follows: "Item Snow Ditch expenses during 1901. Debit, \$1694.84."

Evidence Introduced by Testimony of Milton J. Green, Called by Plaintiff.

I am attorney-at-law. I was born in Oroville in 1858, and lived there from my birth until 1889. I knew M. B. West, O. P. Powers, F. B. Miller and possibly J. T. Soule, slightly. I know the ditch called the West Ditch. My recollection is that it was originally called the Walker and Wilson Ditch and in later years the Powers Ditch. I knew Mr. West prior to January 31st, 1876, Mr. West, and I think a man by the name of Dan Matthews, owned the ditch [257] as partners. To the best of my recollection the water was used in connection with a hydraulic mine which they operated on the north bank of the Feather River opposite Oroville. I think the ditch had its intake at Little Butte and extended in a southerly direction towards Oroville. After January 31st, 1876, O. P. Powers, J. T. Soule and F. B. Miller were in possession of the ditch and operated it in connection with a hydraulic mine. They purchased it.

I know in a general way that when the Thermalito Colony Company was launched,—of course I cannot be positive about the time, but the best of my recollection is it was 1886,—that the only source of water supply for irrigation purposes for irrigating that colony, was this mining ditch which had been known as the West Ditch and later as the Powers ditch. I

(Testimony of Milton J. Green.)

know Major Jones of Oroville; he was interested in the Thermalito Colony Company as was also A. W. Fogg. Major Jones was one of the active parties interested in the Thermalito Colony Company. O. P. Powers and J. T. Soule and F. B. Miller undoubtedly used the water for hydraulic mining purposes in connection with a mine that was owned by them opposite Oroville. I know they mined there for several years and discharged the debris directly into the Feather River opposite Oroville and were active for several years until the agitation against hydraulic mining became acute, and then gradually they suspended operations, until they finally quit. The water after they suspended operations was used for the Thermalito Colony Company. My recollection is there was probably an interim of several years, though not many, between the time that Powers and his associates suspended operations on the mine before the colony was established. The colony had irrigable land which was sold and this ditch supplied it with water.

Cross-examination.

Powers and his associates purchased the ditch in 1876, [258] and my recollection is that the Thermalito Colony Company was established along about 1886 or 1887, and there may have been an interim there of one to three years, when Powers and company did not use the water in connection with their mining, along in the latter years. It could not be more than two or three years. I remember seeing the mine lighted up from the Oroville side of the

(Testimony of Anna Pauline Peters.)

river, and I know that Powers and his associates were quite active in prosecuting their mining operations. [259]

Evidence Introduced by Testimony of Anna Pauline Peters, Called by Plaintiff.

I have been in the employ of the Oroville office of the Oro Electric Corporation since September, 1902. My duties are taking care of the consumers' ledger, making out the bills, and at that time I did part of the collections. We sent bills to Mr. George B. Mowry and the Bader Gold Mining Company. The form of the bills was for water rent due for whatever month it may have been. The bills were written by me personally with the help of the office, and were sent monthly. These bills were never for the use of the ditch; it was for water rent due; I am positive of that. The bill shown me is practically the same as the form sent out to the Bader people with the exception that it was the Oroville Water Company instead of Oro Water, Light & Power Company, and there was a stub attached. (Form of bill was then introduced in evidence as Plaintiff's Exhibit 11, and was as follows):

**Plaintiff's Exhibit No. 11—Blank Form of Bill of Oro
Water, Light and Power Company.**

“No. _____ Oroville, Cal., _____

Mr. _____

To ORO WATER, LIGHT AND POWER CO.,
DR.

Water rate for _____ \$_____

Received Payment,

_____,
For Oro Water, Light and Power Co.” [260]

I do not think I ever sent out to the Bader people or Mr. Mowry any bill or receipt other than in the form I have stated; I have no recollection of anything of the sort. I think the payments were made by the Bader people by check, but I am not sure of that.

Cross-examination.

I remember letters being written to Mr. Mowry at San Francisco asking for remittances for the water. The bills were always sent to Mr. Mowry. I could not say as to whether the bills were given to the ditch-tender to collect or not. The custom was to send the bills out from the office to those who were out of the city.

I do not think we had any account with Matt Bader at any time between the years 1902 and 1910. I remember a man by the name of Sam Irwin in our office; he was the head of the accounting department. The bills were sometimes made in the name of George B. Mowry and sometimes in the name of the Bader Gold Mining Company.

(Testimony of Anna Pauline Peters.)

I recognize the signature of the latter shown me as being that of Mr. Samuel M. Irwin. (The letter which was on the letter-head of the Oroville Water, Light & Power Company, and dated February 14th, 1908, at Oroville, California, was addressed to L. Cohn & Co., Magalia, Cal., and was introduced in evidence as Defendant's Exhibit "C," and was read in evidence as follows:)

**Defendant's Exhibit "C"—Excerpt from Letter,
Oroville Water, Light & Power Company to
L. Cohn & Company.**

"You will also find herewith check in the sum of \$137.90 in favor of Matt Bader for his bills in the sum of \$42.50, \$22.60, \$72.80, making \$137.90. Kindly have him sign the enclosed receipt and return to this office with the others. I wish, however, that you would try to collect from him a bill of \$30 which he has been owing us for two or three years for water furnished the Bader Mine. You might collect this money and credit us on account with the same. [261] Thanking you for your courtesies in these matters, we are, yours very truly, Oro Water, Light & Power Company, Sam. M. Irwin, Auditor," and the initials "S. M. I—H."

The account with Mr. Mowry and the Bader Company was on the books when I went to the company. I am not positive whether the account was in Mr. Mowry's or the Bader Gold Mining Company's name.

"Mr. ORRICK.—Your Honor, I now wish to offer in evidence certain deeds with reference to the Pow-

(Testimony of Anna Pauline Peters.)

ers water right. They all appear in the abstract, and under the stipulation I assume that no objection will be made to them on the score that certified copies from the records are not produced. The first deed is one which is found on page 35 of the abstracts, bearing date the 31st day of January, 1876, executed by M. B. West to O. P. Powers, J. T. Soule and F. B. Miller, reciting a consideration of \$45,000, and purporting to grant, bargain and sell unto Powers, Soule and Miller all the right, title and interest of the party of the first part, who is M B. West, of, in and to that certain water ditch situate, lying and being in Kimsheew, Oregon and Hamilton Townships, County of Butte, and State of California, formerly known as Walker & Wilson Ditch and now known as the West Ditch, commencing at a dam on Little Butte Creek about one-quarter of a mile below Neal's sawmill and thence running along and down the banks of said creek; thence over the divide between Little Butte Creek and Dry Creek; thence along and down said Dry Creek; thence over the mountain to Saint Clair's Flat; thence along the foot of Table Mountain to Thompson Flat, together with all flumes, reservoirs, lateral and side ditches, water, office and buildings, and all appurtenances thereto belonging or in any wise appertaining duly acknowledged and [262] recorded thereafter in the office of the County Recorder of Butte County in Liber P of Deeds at page 386.

Following that deed, I offer in evidence a mortgage appearing on page 48 of the abstract, bearing

(Testimony of Anna Pauline Peters.)

date the 3d day of May, 1880, executed by J. T. Soule, F. B. Miller and O. P. Powers, to Jenkin Morgan, mortgaging all of the property I have described in the last mentioned deed to secure the payment of a certain promissory note, the mortgage being duly acknowledged and thereafter recorded in the office of the County Recorder of Butte County in Liber M of Mortgages, page 274. The recordation was on the 4th day of May, 1880. I will say that the recordation of the deed from West to Powers, Soule and Miller, which I just referred to, was on the 6th day of February, 1876.

I next offer an instrument appearing on page 51 of the abstract, being a *Lis Pendens* in the case of Jenkin Morgan vs. J. T. Soule, O. P. Powers, and J. H. Mitchell, administrator of the estate of F. B. Miller, dated the 22d day of July, 1882, and recorded on the 22d day of July, 1882, in Liber A, of notices of actions, page 292, Butte County records. The abstract shows further, and I offer it in evidence, the proceedings had in the case referred to, being the case of Jenkin Morgan, plaintiff, vs. J. T. Soule, O. P. Powers and J. H. Mitchell to foreclose the mortgage last mentioned. Is it necessary that I produce the judgment-roll in that action, or are you willing to accept the abstract?

Mr. CROSS.—The abstract will cover that.

Mr. ORRICK.—There is a decree of foreclosure and sale, and this is followed by a report of the commissioner appointed by the Court, N. D. Plum, from which it appears that Plum sold the property to

(Testimony of Anna Pauline Peters.)

Morgan to satisfy this judgment. We further offer in evidence the commissioner's deed executed by Plum to Jenkin Morgan, bearing date [263] the 23d day of June, 1883, and recorded, in Liber W of Deeds, at page 111, Butte County records. I might say that the property described in the foreclosure proceedings and in the decree and order of sale, and in the commissioner's deed is the same as that which I have already read from the first-mentioned deed.

I further offer in evidence a deed executed by Jenkin Morgan to A. F. Jones, bearing date the 11th day of June, 1887, conveying to the grantee an undivided one-eighth interest in the property referred to.

Mr. CROSS.—Of the property described in the first deed?

Mr. ORRICK.—Yes, it is the same property. This deed was duly acknowledged and recorded on the 11th day of June, 1887, in Liber 27 of Deeds, page 488, Butte County Records.

I also offer in evidence another deed bearing date the 12th day of July, 1887, executed by Jenkin Morgan to A. F. Jones, and conveying to the grantee an undivided one-thirty-second interest in the property described. This deed was duly acknowledged and recorded on the 14th day of July, 1887, in Liber 27 of Deeds, page 606, Butte County Records.

Also a deed bearing date the 15th day of September, 1887, executed by Jenkin Morgan to A. F. Jones, conveying to the grantee an undivided one-tenth interest in the same property. This deed was duly acknowledged and thereafter recorded on the 22d day

(Testimony of Anna Pauline Peters.)

of September, 1887, in Liber 28 of Deeds, page 66, Butte County Records.

Also a deed bearing date the second day of September, 1890, executed by Jenkin Morgan to A. F. Jones, conveying to the grantee an undivided 26/100ths interest in the same property. This deed was duly acknowledged and thereafter, to wit, on the 25th day of July, 1898, recorded in the office of the County Recorder of Butte County in Liber 50 of Deeds at page 546. [264]

I also offer in evidence a deed bearing date the 20th day of May, 1898, executed by Jenkin Morgan to A. F. Jones, conveying to the grantee an undivided 147-800ths interest in the above-mentioned property. This deed was duly acknowledged, and thereafter, namely, on the 25th day of July, 1898, recorded in Liber 50 of Deeds at page 545, Butte County Records.

Also a deed bearing date the 20th day of May, 1898, executed by Jenkin Morgan to A. F. Jones, conveying to the grantee an undivided 3-10ths interest in the same property. This deed was duly acknowledged, and was thereafter, namely, on the 25th day of July, 1898, recorded in Liber 50 of Deeds at page 549, Butte County Records.

Also a deed bearing date the 9th day of October, 1897, executed by A. F. Jones and Thermalita Colony Company to Walter Cutting. By this deed there was granted, bargained, sold and conveyed unto the grantee all of the property above mentioned. This deed was duly acknowledged, and was thereafter,

(Testimony of Anna Pauline Peters.)

namely on the 5th day of November, 1897, duly recorded in the office of the County Recorder of Butte County in Liber 48 of Deeds at page 139.

Also a deed executed by A. F. Jones and May S. Jones, his wife, to the Oroville Water Company, bearing date the 25th day of May, 1898, granting, bargaining, selling, conveying and confirming unto the grantee all of the property above mentioned. This deed was acknowledged, and was thereafter, namely, on the 25th day of July, 1898, duly recorded in the office of the County Recorder of Butte County, in Liber 34 of Deeds at page 457.

Mr. CROSS.—By the property above mentioned, do you refer to the undivided interest?

Mr. ORRICK.—I mean a description of the property. The way it went, Mr. Cross, was, that this man, Jenkin Morgan, who bought the [265] property at the foreclosure sale, conveyed to Major Jones from time to time various undivided interests, so that Jones finally gathered the whole thing and turned it over to the water company, as shown by the deed of Jones and his wife to the Oroville Water Company. I have already introduced in evidence the deeds from Oroville Water Company to Oro Water, Light & Power Company conveying both the Powers water-right and the Powers Ditch and the Nickerson water-right and the Nickerson Ditch to Oro Water Light and Power Company, and likewise the deed from Oro Water Light and Power Company to Oro Electric Corporation conveying the Powers water-right and the Powers Ditch and the

(Testimony of Anna Pauline Peters.)

Nickerson water-right and the Nickerson Ditch to Oro Electric Corporation.

“Mr. BRANDT.—Can the offer stand until we look this over?

Mr. ORRICK.—Certainly.

The MASTER.—Unless there is an objection made, I will consider all that statement as stipulated evidence.

Mr. BRANDT.—We will state if there is any objection.”

It was stipulated that the statement of Mr. Orrick as to the contents of said deeds would be accepted in lieu of introducing the original deeds in evidence, or copies thereof.

**Evidence Introduced by Testimony of A. W. Fogg,
Called by Plaintiff.**

I am sixty-six years old and reside at Oroville. I have resided there since 1857. My business is fruit-raising at the present time. I was familiar with the ditch known as the West or Powers Ditch in the early days. When I first knew the ditch it took water out of Little Butte Creek and brought it in a southerly direction towards Oroville. I was personally acquainted with Mr. M. B. West. He used it for mining purposes. I was acquainted with the ditch also when O. P. Powers, J. T. Soule and F. B. Miller had it; they or rather Mr. Powers, used it for irrigation purposes, as well as [266] for mining. The Oroville Water Company, which I was interested in, bought water from Powers individually after he succeeded to the ownership of that particu-

(Testimony of A. W. Fogg.)

lar ditch. We bought the water to supply the town of Oroville for irrigating purposes. I was the promoter of the Oroville Water Company. I should judge that company commenced to do business fully thirty-five years ago. I was secretary of the company, and I know Mr. George B. Mowry. I remember that after Powers disposed of the property to Jenkin Morgan and Jenkin Morgan to the Thermaito Colony Company,—if I remember correctly,—I am not positive about that,—the Oroville Water Company came into possession of the Powers system and the Nickerson and Miocene systems and after that—at that time rather—I remember of Mr. Mowry coming to the Oroville Water Company and making arrangements for which he paid a nominal sum for the use of the water and agreeing to take care of the ditch that conducted that water to the system then owned by the [267] Oroville Water Company. I don't remember that we rented it. My recollection is that we, in meeting, passed a resolution authorizing him, upon the payment,—my recollection is it was \$50.00,—whether it was for the season or for the time he used water for mining purposes, I could not say positively, but it was one or the other, and he was to take care as I say of the conducting of the water into the ditches of the system; now that is my recollection of it. I know he was to take care of the ditches that conducted that water into the Powers system, into the system that we had then in our possession. I could not say positively whether it was the Powers or the Nickerson Ditch

(Testimony of A. W. Fogg.)

which he was to take care of. He used to take the water from us; just what ditch that was I could not say, whether it was the Nickerson or the Miocene; it was the company's water.

“Q. Did you, Mr. Fogg, at that time agree with Mowry that he was to take his own water out of the Nickerson Ditch, or was the agreement as you have just stated, that he should take the water out of the Nickerson Ditch, paying for it, and keeping a part of the ditch in repair?

A. Well, now, as I remember it, he was to take the water from us—just what ditch that was I could not say, whether it was the Nickerson Ditch or the Miocene.

The MASTER.—The point of the question is, was there any stipulation to the effect that it was the company's water, or Mr. Mowry's water.

A. It was the company's water, yes.”

I ceased as secretary of the company when it was transferred to the Oro Water, Light & Power Company.

Cross-examination.

I don't remember the year when this arrangement was made with Mr. Mowry, but it would be perhaps three or four years before we made the transfer to the present owners. I think we had two [268] transactions with Mr. Mowry. My recollection is that we had two with him. It is my recollection that all our business with him was in 1900, and from there up to 1905 when the water company was sold.

(Testimony of A. W. Fogg.)

Mr. John J. Smith was president of the company at that time.

I could not say that in 1900 we were carrying water through the Powers Ditch. I could not say positively whether the Oroville Water Company had taken that over at that time or not, but if it had not it was buying the water from the Thermalito Colony Company that they were obtaining from the ditch system. We had at that time possession of all those ditches. We had possession of the Thompson Flat Ditch in its entirety from its head waters to its outlet. The Thompson Flat Ditch is called the Powers Ditch, and it was also known at one time as the Walker & Wilson Ditch, and another time as the West Ditch, and another time as the Miller & Powers Ditch. My recollection is that while we had anything to do with the Powers Ditch we maintained the head-dam. I am quite sure we had something to do with the ditch up to 1905. That was built by Nickerson himself, and afterwards it was taken over by the Oro Water Company, and now the Oro Water, Light & Power Company. So far as I remember Powers used that ditch continuously while he owned it, and it was used continuously while Powers, Soule and Miller owned it. My recollection is that Powers used that ditch right up to the time that he sold it to Jenkin Morgan.

The rate that was charged Mr. Mowry was a flat rate,—so much for the season. The agreement with Mr. Mowry was made with Mr. Smith, the president of the company, and the whole thing was done by

(Testimony of A. W. Fogg.)

[269] a resolution of the Board of Directors, McLaughlin had the Nickerson Ditch prior to the acquisition of it by the Oroville Water Company.

Evidence Introduced by Testimony of James W. Goodwin, Called by Plaintiff.

I am forty-seven years old and reside in San Mateo County. I am president of the Oro Electric Corporation, and was formerly interested in the Oroville Water Company, becoming interested about 1901. It was in operation for some time after that and was succeeded by the Oro Water, Light & Power Company. I was in the section around Oroville prior to that time. I had become interested in that community several years before that. When I became interested in the Oroville Water Company in 1901 I went over the system, including Little Butte Creek, at the Nickerson head-dam. Between the years 1901 and 1906 I probably visited the head-dam of the ditch two or three times a year. I have not been on Little Butte Creek for several years. I would usually go up there during the summer, spring or fall, but not during the winter. Whenever I was there all the water in Little Butte Creek was being conducted into the Nickerson Ditch. It was being conducted from quite a ways above the head-dam as a rule. There would be a sort of a ditch out in the sand in Little Butte Creek and it would be conducted down to the head-dam of the Nickerson Ditch to the head-gate. At all of the times I was there during the summer this was true, namely, that all of the water in Little Butte flowed down the Nickerson

(Testimony of James W. Goodwin.)

Ditch. I have never been up there at any time of the year when the water was flowing over the head-dam.

I know George B. Mowry. The Oroville Water Company, while it was in existence, sold him water. I have had a number of conversations with him, as a rule in my office on Pine Street in this city, but I have had conversations with him at Magalia when I was passing through. While the Oroville Water Company was operating he never bought any water during the summer time. It was in the winter when there was a large run-off in Little Butte Creek. At one time he asked me if we could not give him water beyond the time he was getting it in the winter time, and I told him that there wasn't enough [270] water for the people even down at Paradise who were irrigating from the Nickerson Ditch. Mr. Mowry was buying water from us in the winter time. Mr. Mowry at one time paid \$50 a month and at another time \$75 a month. At one time he was behind in his payments. There had been letters written to him from the office in Oroville and he came to see me in relation to getting further time. He did not want to be pushed for the payment at that time, and he subsequently made the payments. In none of these conversations I had with him did he claim that he owned the water, or that he was renting the ditch from me. I have never heard of any such claim as that before you told me at my office in the last few days that he had made that claim in court.

It is my recollection that I made the arrangement

(Testimony of James W. Goodwin.)

with him for the use of the water from the ditch. That is when he was getting it for \$50 a month. My recollection is that he was to take water during the winter season and while we could furnish it to him, and that for that he was to give us \$50 a month. No arrangement was made with him to the effect that he should rent the Nickerson Ditch from the head-dam to the spillway and should convey through his rented ditch some of his own water. I would not have permitted such an arrangement for a minute.

The Oroville Water Company, the Oro Water, Light & Power Company and the Oro Electric Corporation have paid all the taxes assessed on the Nickerson Ditch during the period of their holding.

Cross-examination.

I could not say whether the arrangement with Mr. Mowry for the use of the water from the ditch was in 1901 or 1902. It was about the time we acquired our interest in that. I think that was the beginning of 1902, and it was about that time that the arrangement was made with him. He said at that time he was going to use the water for mining purposes, but he did not say it was for [271] hydraulicking, nor did he say anything to me in respect to not being able to get enough water out of Little Butte Creek to mine with.

I was on Little Butte Creek during the spring and summer and fall. There was not a year passed but what I was there once or twice. I never saw any water flowing down Little Butte Creek below the Nickerson head-dam in spring time. As a rule, I

(Testimony of James W. Goodwin.)

would be there late in spring; in April or May; about the time they would begin to irrigate in Paradise. I have never been down to the head-dam of the Powers Ditch. Whenever I was there, there was no water flowing out of the ditch until the water got down to Paradise, because when I was up there it was always in that reference. We had a great many requests made by those people down at Paradise to increase the water supply to them.

When I was up there it was always with reference to Paradise. We had a great many requests made by those people to increase the water supply to them and we looked up the proposition of bringing in other water if we could; to give them more water—and I always was looking to give them every bit of water that came down Little Butte Creek, and whenever I was up there a number of times I went down that ditch, and during the summer time all the water was always coming down there to these people.

Redirect Examination.

I have been there since 1906 in the summer time. The Nickerson Ditch was then taking all the water. Whenever I have been there the Nickerson Ditch was taking all the water. The arrangement made with Mr. Mowry was yearly or seasonly; it was for the winter season.

I did not have any conversation with Mr. Mowry in San Francisco in 1906 wherein he told me that our people were enlarging the Nickerson Ditch, and I replied in substance that they [272] would not enlarge it through his land. I don't think I had any

(Testimony of James W. Goodwin.)

conversation with him about that time wherein he stated he was going to take water out of the Nickerson Ditch without paying for it, and I replied: "If you do you will get into trouble, Mowry," or something [273] to that effect. I recall no conversation in which Mr. Mowry stated to me that we were enlarging the ditch. I never heard of that statement until it was told to me by Mr. Orrick. The ditch has not been enlarged to my knowledge.

EVIDENCE IN REBUTTAL INTRODUCED BY DEFENDANT.

Evidence Introduced by Testimony of F. H. Fowler, Called by Defendant.

I am district engineer, District 5, of the United States Forest Service. The Forest Service has been preparing a general report on the developed hydroelectric power in California; it has prepared it for publication and it will be published shortly by the Department of the Interior, United States Geological Survey, as a water supply paper. In preparing that, I was in charge of the work, and I went around the state and visited the various power installations, and wrote up descriptions of them, so far as I was able to, on the ground. There were naturally certain measurements which I could not give. I prepared it in the form of sections. This is the section for the Oro Electric Corporation. There was certain material I could not get on the ground, like the capacity of the ditches, and so forth, I did not have time to take measurements, and so I left blank where those measurements were to be put in, and I mailed

(Testimony of F. H. Fowler.)

these various sections to the various companies. The rough draft was sent to the Oro Electric Corporation for revision, for any mistakes that might have occurred in what I had given, and also asking them to fill in the blanks. These blanks were filled in in pencil and the rough draft was returned to me with a letter signed by Mr. Kalemborn, I think it was. The letter is as follows: "October 13, 1913. United States Department of Agriculture, First National Bank Building, San Francisco, Cal. Dear Sirs: Attention of Mr. F. F. Fowler, Dist. Engineer: [274] Enclosed we are returning to you the rough draft describing our Lime Saddle and Coal Canyon Hydro-electric plants, with additions and corrections, as per your request under date of October 7th. We trust the same is in accordance with your wishes, and beg to remain, yours very truly, Oro Electric Corporation, by A. S. Kalemborn. ASK—W."

When that was returned to me I went over it and did merely editorial work. All of that shows, I believe, in there—at least in the section of the Nickerson Ditch, in ink. That is my writing. The pencil writing was put in by some member of the company, I do not know by whom, and transmitted back to me over Mr. Kalemborn's signature.

I have taken out of the draft the two sheets describing the Nickerson Ditch, the letter of transmittal to the company, and Mr. Kalemborn's letter returning the material, and I have had them photostated. The pencil notations are the ones that were filled in by the company before it was returned to me. What

(Testimony of F. H. Fowler.)

appears in ink are editorial notes by me before the final draft for the printer was made up, and the typewritten portion was made by myself before sending it to the company. All that is in pencil was done in the office of the Oro Electric, by whom I do not know. As to the capacity of the ditch, the figures 40.1 is in pencil. As an editorial measure I changed that to slightly over 40 second-feet. Referring to the photostate copies the following errors are in pencil: The words "timber crib"; further along the figures "52" and "10" in the same line; the figures "5.9"; and on the next line the figures "4 to 7 ft."; and the figures "2 to 44"; and the same line "15 ft. pr. mi."; the figures "8.88"; the figures "2-(16 and 24 feet)." At the end of the paragraph the figures "40." It was originally 40.1 and the .1 was taken out by me and the words "slightly over" inserted.

(The photostatic copy was thereupon introduced in evidence as Defendant's Exhibit "D.") [275]

(There was then offered in evidence a map produced by the witness which was filed with an application for a permit to use the Miocene Ditch showing the entire ditch system, as Defendant's Exhibit "E.")

Cross-examination.

I got permits from all the various companies to visit, photograph and take notes of their plants. I went out on an extended trip through the State and made such notations and got up the descriptions, as far as possible. Naturally, I could not measure ditch systems and all that and so I drew up my obser-

(Testimony of F. H. Fowler.)

vations as far as possible and left blanks where I wanted to get certain information, and returned these to the companies, and they filled in the blanks, made corrections of misstatements, and returned the material to me at the time I edited it, and turned it over to the U. S. Geological Survey. I did not ask the companies when I sent out the papers to cause surveys to be made for the purpose of filling in the blanks with entire accuracy. I intended by all means that they should be filled with accuracy, but from such data as the company had. I expected if the survey was actually made that they would supply me with the information from the survey, so that it would be scientifically accurate. So far as I could tell all the ditches had been surveyed at one time or another.

The only writing I addressed to the company requesting the furnishing of the information so far as I know was the one admitted in evidence. I prepared memorandum at various times. I would look through these rough drafts, decide what information I wanted, prepare a memorandum for my own use, and go and see the various officers of the company. I think Mr. Durbrow will remember I came to see him with regard to certain financial data. [276]

All I have in regard to those figures entered on the draft by the company is contained in Mr. Kalem-born's letter. All that I know in regard to the figures is that the figures are there themselves and that they were returned with the letter. I have no further information regarding how they were obtained or who put them in.

(Testimony of F. H. Fowler.)

I did not expect that it would be a satisfactory answer to the general questions asked by me to give a sort of average between the larger capacity and the small capacity of the ditch arising from the fact that there may have been a creek feeder coming in at the upper end which was considerably higher than the lower end. I think the thing that I would have expected and the thing that I think the engineers would have given would have been the amount of water that that ditch would normally be able to deliver to Kunkle Reservoir. As I understand it, from looking at the maps and from what I gathered, the Nickerson Ditch crosses a number of gulleys. I did not go along the ditch itself, and I do not know from my own personal information that there was any greater variation in the capacity of the ditch. Of course in all ditches you will find probably from place to place a variation in capacity. The only thing that interested me in getting this information was how much is the Nickerson Ditch normally able to deliver to the Kunkle Reservoir for use in the plant. Other things I was not very much interested in. Looking at the way the ditch follows around the topography I suppose that the lower end of the Nickerson Ditch was crossed by ravines which bring water into it during high water, probably no more than is usual with every sidehill ditch. As far as my idea of the capacity of the Nickerson Ditch obtained from this note, it was simply that the ditch was able to deliver to the plant 40 second-feet. I had no knowledge whatever of any variation in the capacity [277]

(Testimony of F. H. Fowler.)

aside from that. It is customary on these long ditches to pick up any streams that are crossed; you find that in almost any case. It does not necessarily mean that towards the lower end of the ditch the capacity is increased because usually the time when people are interested in getting that extra water in is when they haven't enough to fill their ditch anyway. Judging from the water-shed alone you probably would not be able to get much from the Nicker-son Ditch in the summer time.

Evidence Introduced by Testimony of William Durbrow, Recalled for Defendant.

I think I have seen the map which has been identified by Mr. Fowler. It is certified correct by Mr. Galloway, our engineer. I attend to a great many of the engineering matters of the Oro Electric Corporation. I undoubtedly have seen this map and have used it, but I had nothing to do with its preparation. There are quite a number of maps similar to this which were used. I think the only survey we made of the ditch is the Gradon Survey, and a survey made under Kluegel. I don't think that Galloway made a survey of this ditch; he probably used the data that was in the office at the time. Undoubtedly the field-notes referred to by the notation on the map as Exhibit "B" are in our office. I will produce these field-notes upon which Mr. Galloway based his survey.

**Evidence Introduced by Testimony of W. L. Huber,
Called by Defendant.**

I am 31 years old and a civil engineer; a graduate of the State University, and have been practicing my profession for nine or ten years. I was at one time assistant to J. D. Galloway, and I assisted in designing Plants 4 and 5 of the Nevada-California Power Company. Later I assisted Mr. Galloway in a lot of structural work. After that I was the principal steel designer of the firm of Howard and Galloway. I assisted Mr. Galloway on hydro-electric [278] power investigation. Then I was assistant engineer of the United States Forest Service for almost three years. Since that time I have had my own office in San Francisco. While I was with the Government I was in charge of work that had to do with the measurement of ditches and water flow. I have had experience with ditches in the neighborhood of Butte County, California, being familiar with the ditch of the Palermo Land & Water Co., the lower portion of the Miocene Ditch, and some of the ditches of the Oro Electric Corporation about Yolo Creek.

Referring to Plaintiff's Exhibits 3 and 4, consisting of a profile of the Nickerson Ditch and field-notes made by Mr. Gradon, I will state that I have examined them and from that examination have figured the capacity of the ditch. I have computed it in various sections. I have made computations of the flow as shown by his notes to have existed when the ditch was measured. I find that varies with different sections somewhat, according to my calculations from

(Testimony of W. L. Huber.)

24 to 32 second-feet; in most places it is 28 second-feet. The minimum flow according to his field-notes, that is, referring to the actual water flowing at the time when he measured it, was 24 second-feet.

I have made computations as to the capacity of the ditch. At the sections which will carry the least amount I found that 40 second-feet could be carried when the ditch is filled to approximately $4\frac{1}{2}$ inches of overflowing; that is, $4\frac{1}{2}$ inches below the top of the berm.

Assuming that the soil through which this ditch runs is partly rock and partly porphyry, that it was built in 1888, and that the lower side of the ditch has been used during that period as a pathway, I think it could safely carry 40 second-feet. [279]

There are three factors that enter into the consideration of the fact that different sections of a ditch will have a different carrying capacity; one is friction on the sides of the ditch, and the second is the cross-section of the ditch, and the third is the velocity. My calculation was made from surveys. There might have been a slight inaccuracy in making the cross-section or in the slope. The friction factor varies in different parts of the ditch. It might have vegetable growth in certain parts and not in others. For the purposes of my calculation I have used the frictional factor of N-Cutter's formula, N is equal to .025.

Cross-examination.

It is true that a surveyor in making a survey of the cross-section might not catch the minimum flows.

(Testimony of W. L. Huber.)

A more accurate result could be secured by putting the water in the ditch and measuring it. If that survey is correct it is my belief that it would be safe to carry the water into this ditch to within $4\frac{1}{2}$ inches of the top. I am basing my belief as to the soil on similar ditches in Butte County; partly the Miocene and partly the Palermo Land & Water Company's ditch. I have not been on a part of the Nickerson Ditch and am not able to tell whether the character of the soil where the Nickerson is built is the same as where the Miocene is built. If I were making a report for a client I would go there and look at it first before rendering a report on field-notes alone. Where the soil is firmer and has lots of rock in it you can carry the water higher than where the soil is loose. I will testify that if that soil is similar to that of the Miocene Ditch it will safely carry 40 second-feet, but I can't testify that the soil is in fact similar. My testimony is based on the hypothesis that the water can be carried with safety within $4\frac{1}{2}$ inches of the berm at the lowest section. The water flowing when the survey was made averaged about [280] 28 second-feet. If that was as high as it could be carried, reducing that to miner's inches would make it 1,400 inches—the common custom in that country being that one cubic foot is equal to 50 miner's inches. If the ditch on the day on which Mr. Graddon made his measurement was carrying water as high as it safely could, this 1,400 miner's inches would represent the capacity of the ditch.

(Testimony of W. L. Huber.)

Redirect Examination.

I have measured the ditch from the notes of Mr. Gradon for other possible heights of water. At the critical station, which is station 202 plus 25, I found it to be 35 second-feet when flowing 6 inches from the top. This is the point where the berm is the lowest. Computing it when it would actually run over I found it would carry 54.9 second-feet. The other calculation made at this station was $4\frac{1}{2}$ inches below the top of the berm, and at the water surface. At the water surface as given by the survey the capacity was 28 second-feet. At $4\frac{1}{2}$ inches from the top it is 40 second-feet.

A flume 4 feet wide and 2 feet deep would carry less water than a flume approximately six feet wide and two feet deep, both having the same slope. The relative proportion would be approximately as 4 is to 6; not absolutely, but very close to that relation.

Increase in grade increases the capacity of a ditch, all other elements or dimensions remaining the same. Assuming a ditch had a grade of 9.6 feet to the mile and that the grade was then increased to 15 feet to the mile, the increase of the grade would increase the capacity of the ditch about 30%—though I have not made any direct computation. [281]

“The MASTER.—How can that be possible, Mr. Cross? Do you contend that the grade has been increased in this case? If so, it is a new point. There is a variation as to the grade. This ditch has always been on the same grade so far as I remember the evidence.

(Testimony of W. L. Huber.)

Mr. CROSS.—The old Delaplain grade.

Mr. BRANDT.—Mr. North testified it was 9.60 when he dug it. Mr. Gradon puts in 15 feet.

Mr. ORRICK.—Gradon was testifying from the spillway up and North was testifying as to the whole ditch. I don't think there is any conflict in that.

The MASTER.—Well, the conflict has to be explained on some other ground. You have a starting point and an ending point; you cannot have a change in the grade of your ditch except at certain points; you would have to dig a new ditch.

The velocity of the water through a ditch is governed by its minimum grade, the dimensions remaining equal. It is possible to increase the minimum grade, thereby increasing the capacity of the whole ditch, although the average grade [282] of the ditch may remain the same.

Recross-examination.

The capacity of the ditch must be determined by some minimum section; it may be a flume section, or may be a ditch section. The flume measurements would be of interest in this case, for there are certain flow measurements made by a flume which seem to be about 28 feet. That seems to be about equal to the calculations making N equal to .025.

Different ditches can carry water safely at different heights. There are some ditches which cannot carry water within a couple of feet of the top, that being true of certain sections in the open cut of the Los Angeles Aqueduct, which is through a very light pumice soil. Some ditches can carry the water to the

(Testimony of W. L. Huber.)

point of overflow. Before making a design I would want to make an examination on the ground with the view of ascertaining how high it could be safely carried from the top, or else ascertain that from somebody who knew. My judgment is in this case affected by ditches in soil which I believe is very similar. I have no actual knowledge of the Nickerson Ditch. Walking on the top of the berm would only affect the area of cross-section available; it would make the berm much more compact. It might wear it lower. Assuming that the character of the soil through which the Miocene Ditch proceeds is serpentine and the character of the soil through which the Nickerson proceeds is entirely different, that would make a difference in respect to the height to which you could carry the water in the two ditches. The calculation made as to the capacity of the ditch when the water was carried to the point of overflow was purely theoretical, and had nothing to do with this case. It would not be practicable to carry it to that point.

The minimum section of the ditch is a very short one—about 200 feet. The capacity of the other section is very much more. [283] Assuming that the Miocene Ditch is through a serpentine formation and that the Nickerson Ditch is through a porphyry formation, the carrying capacity of the two ditches so far as the character of the soil is concerned, would be about the same. The terms “serpentine” and “porphyry” are only relative; they might differ widely; it would be necessary to actually see it in such cases.

**Evidence Introduced by Testimony of T. J. Irwin,
Recalled for Defendant.**

I have crossed Little Butte Creek a good many times in different places between the Mineral Slide Mine and the head-dam of the Nickerson Ditch. Between these points there are two or three or four different places where a small quantity of water comes in during the summer time. Between the site of the Powers head-dam and the head-dam of the Nickerson Ditch there is one place,—the tunnel—where about 4 or 5 inches of water comes out. This is the Mat Bader mining tunnel. The Mat Bader Mining tunnel is above the Bader Mine, we have been talking about.

I worked at the Mineral Slide Mine in 1912, commencing in September and quitting in April, 1913. We used water there at that time, the flume carrying about 150 or 200 inches, and we used all that quantity of water. The water came from Little Butte Creek. Between the Mowry spillway and where we used the water at the Mineral Slide Mine there was some springs that would bring in a small quantity of water. In September this amount might be 3 or 4 inches; in some places it might be less. We were using the water at the Mineral Slide Mine from the time I went there in September until I quit in April, 1913.

I worked a few shifts for Mr. Mowry at the Bader Mine. The first time was in January, 1911. The next time was in the last of January or first of Feb-

(Testimony of T. J. Irwin.)

ruary, 1912, and I worked a few shifts on [284] the ditch at the spillway in July, 1912. In July, 1912, I went down there and watched the ditch. He wanted water through his spillway. In January, 1911, they were using water at the Bader Mine from the days I was working there, the same being true of 1912. This water came out of the Nickerson Ditch. The water was turned on in the morning and shut off in the evening.

Cross-examination.

There were no springs flowing into Little Butte Creek below the Nickerson head-dam and the place where the old Powers head-dam was, other than the Mat Bader tunnel. I have never made any examination there in summer with the view of ascertaining just how many springs there were. The only way I was along there would be hunting and fishing when I would accidentally come on to them. There is seepage water all along the creek, and there might be springs.

Evidence Introduced by Testimony of L. Cohn, Recalled for Defendant.

I have seen the Nickerson Ditch in winter. During the stormy season or high water there were parts of the ditch running pretty full and of course others that were not quite so full. I should judge that I have seen it within 6 or 7 inches of the top in a place or two. The soil along in the Nickerson Ditch is lava soil and bedrock,—rock soil. The lava soil packs and packs solid, and the rock of course is a solid body. I have walked along the path of the Nickerson Ditch.

(Testimony of L. Cohn.)

It is hard,—the lava soil packing very hard,—hard and tight. At some places along the ditch it is lava soil and at other places it is bedrock, but it is either one or the other.

Mr. Mowry was accustomed to draw drafts or orders on us for paying off the men and we would pay them. That has been going on for some period of time. He would make out the orders and the boss [285] would come over and endorse them and we would cash them. These drafts were drawn on us all the time he was working, and the pay-days occurred continuously every month,—summer and winter,—with the exception of the time that Mr. Mowry was gone or shut down, which was very seldom. I have here a draft dated July 3, 1908, addressed to L. Cohn & Co. and directing them to pay to the order of Ed Bishop \$20, for value received, and charge to the account of the Bader Gold Mining Company, signed by the Bader Gold Mining Company by George B. Mowry. This draft was for labor performed at the mine. I know that Mr. Bishop worked at the mine for the period covered by that draft for the simple reason that he was trading with us and I knew that that was his source of revenue, and that is where we would get out money for the supplies he bought. The words "No. 2" appear on the draft, and that must have been the starter.

**Evidence Introduced by Testimony of William C.
Bader, Called by Defendant.**

I am thirty-three years old and I have been employed at the Bader Mine at different periods. I

(Testimony of William C. Bader.)

have worked at different times there since 1901 or 2 up until 4 or 5 months ago. I was working at the Bader Mine in 1905 most all the time. The Bader Mining Company got the water at that time out of Little Butte Creek through its own flume; by that I mean through the lower ditch,—the Powers Ditch,—so-called. I should judge that they took in the summer time about 75 inches of water, or something like that, from the ditch. I recall the time that Murphy and the gang of Chinamen worked on the Nickerson Ditch. With reference to that time I think that the Bader Mine right after that got its water out of the Nickerson Ditch. They have continued to get water out of the Nickerson Ditch ever since I have been working for them. I have been working there all the time at different times, summer and winter both. [286] I would turn the water on in the morning when I went to work and I turned it off at night. On two or three times I found the gate closed. I found it turned off one night at quitting time. At that time I saw Mr. Davis and Mr. Biek there and a couple of other gentlemen with them, and on that occasion when the gate was closed I saw Mr. McAtte there. Those were the only occasions I ever remember of seeing a man there and the gate closed down. On the occasion when the gate was closed and McAtte was there I opened the gate while he was there and the gate continued to stay up and the water run through. When Mr. Davis was there I should judge he was measuring the gate.

During the time I was at the mine the water would

(Testimony of William C. Bader.)

run throughout the day from the time it was turned on in the morning until it was turned off at night. There was a cross-gate in the ditch. I built it there myself. The last one I built a year ago I think, in April or May, 1913. I took the old one out and put another one in. I did not put the old gate in. It was there and I took it out and put a new one in. The old cross-gate had been there all the time I had been working at the mine, ever since I can recollect.

I have seen the Nickerson Ditch running full of water and have seen it run full when there was not a freshet. By this I mean the ditch was taking all it could carry. Above the Mowry spillway I have seen the water running maybe 3 or 4 inches from the top in the low places. When we were hydraulicking I have seen it running over.

Between the Mowry spillway and the head-dam there is a path in the top of the Nickerson Ditch. This path is hard and solid and has been ever since 1901, since I have been working there.

I am at present a forest ranger in the Plumas National Forest. [287]

Cross-examination.

When I started to work for the Bader Company in 1901 I think there were 7 or 8 or 9 men, maybe more. When I went there 4 or 5 months ago there were 3 of us working. The 7, 8, 9 or 10 men that I speak of worked there three or four years, I don't know exactly. Since that time there has been 3 and sometimes 4 and sometimes 6.

I recall this date 1905 with reference to the use of

(Testimony of William C. Bader.)

the water from the old Powers Ditch by the fact that in 1906 I was working for the Oro Power Company at the Lime Saddle Power plant, and this was a year prior to that. I went to work for the Oro Power Company, I think it was in the latter part of May or June, and worked until the first of July, 1906,—about the time of the earthquake. I think I worked for the Bader Mining Company pretty much all of 1905. When I was working for the Bader Mining Company the work was steady as long as I wanted it. When I quit of course I went away, and whenever I came back I generally went to work. I don't know whether I was working continuously in 1905 but I think I was working most of the time.

Below the Nickerson head-dam there are some small springs that make up a little water in Little Butte. There have always been a few springs there ever since I knew it. When I was up there in 1901 the Nickerson head-dam was built across Little Butte Creek. This dam took some of the water flowing in Little Butte Creek in the summer time. Some of it went by both in winter and summer. I don't remember whether it was a freshet or what it was but I have seen it go over some in the summer time. I don't remember that that was during some period of unusual high water.

I could not put an estimate upon the amount of water that the creek would make up between the Nickerson head-dam and the [288] Powers head-dam, but it was very little. I have not been at the head-dam of the Nickerson Ditch for quite a while,

(Testimony of William C. Bader.)

but off and on I have been there passing by there but not frequently. The conditions there last summer are different than what they were in 1901. There is very much less water; nowhere near as much water. I don't know whether there was more seepage through the dam in 1901 than there was there last summer. There was more water in the creek. The water that was in the creek in 1901 certainly could not have been made up in the creek. There is some water comes in from what they call the Mat Bader tunnel at the present time. I don't know the exact date when that tunnel was run. When I was working there and the Cherokee Ditch was in operation they used to turn out some water once in awhile, I suppose, to empty the sand gate or something.

We could get along with the amount of water we got from the old Powers Ditch in 1905 and did not need any other water. In that year for awhile there were six men working and for a while four. I don't know the amount of water the Bader Mining Company has been taking from the Nickerson Ditch but I should judge 60 or 70 inches; I never made any estimate of it, nor did I make any estimate of the amount of water I saw in the old Powers Ditch in 1905. At that time the Powers Ditch was full in some places and other places not, according to the grade of the flume. The flume was settled in some places, and some places it was not. From 1901 to 1905 we used water from the Powers Flume at times,—continuously, as long as we could until the water got so low we could not use it any more. I guess

(Testimony of William C. Bader.)

that would be about the time the irrigating season was open. It was when we were hydraulicking that we needed lots of water. When it got low we would shut down. We were hydraulicking between 1900 and 1904, and I think that during the time we were hydraulicking that we closed down in the summer time but I am not positive of that. [289]

At the time I saw Mr. Davis and Mr. Biek at the spillway I had no conversation with them other than passing the time of day. Mr. Davis did not speak to me with reference to taking the water and he has never spoken to me about it. I have no recollection of seeing Mr. Davis on the spillway other than at this time. I have no recollection of Mr. Davis telling me that I had no right to the use of the water. I could not specify the several times when I found the gate closed. Sometimes I missed the water and went up there and found the gate closed and I turned it on again. I would go up right after the water was turned off and turn it on. I did not have to go up there frequently to do so. I think Mr. McAtte closed the gate down once and I don't think he closed it down any more, not to my knowledge.

The time when I said that I had seen the water running over the Nickerson Ditch was at the time when I was looking after the ditch for the Bader Gold Mining Company. They were using the ditch and it was my work to go in and fill in the bank. That was when they were hydraulicking. It was my place to fill in the low places and take care of the ditch for them, keeping the ditch in order from the

(Testimony of William C. Bader.)

spillway up to the head-dam. We wanted the water and we wanted to save the ditch too. The ditch was in a very poor condition at that time. At that time you could run it to the lowest places because it was very solid to the lowest places at the time. There were a lot of low places and I filled them in. As a practical man I would say it is safer to keep the water below the berm than allow it to flow up to the berm. At the present time the ditch is in good condition and the water can run within five or six inches of the top. I think it was safe to carry the water to that height in 1902 when we were hydraulicking as long as there was not a freshet and a man was there to watch it. [290]

There has been some times since 1905 when the mine has been shut down. I would work there when it was shut down doing repair work and keeping the flume clean. During the time it was shut down the water was running from the Nickerson Ditch during the day time and sometimes at night. This was for washing the flumes out; all the waste stuff we had to wash it out and used the water for keeping the flume clean. Even if we did not need it to keep the flume clean and did not need it for washing, it was permitted to run through. This was done under Mr. Mowry's direction.

I recall the time that Murphy was working there with the Chinamen, but I can't fix the exact date. I remember passing him on the ditch when he was working with the Chinamen. He was working right where we crossed the ditch on the Bader Mine trail

(Testimony of William C. Bader.)

going up to Magalia. This was, I should judge, maybe a quarter of a mile above the spillway. It looked to me like they were cleaning it out and maybe making it a little larger. It looked like he was making it larger. I had not observed anyone cleaning it within a few years before that.

Redirect Examination.

I remember a cut in the flume just below the Nickerson head-dam and I have seen water flowing out of that gate into Little Butte Creek. I could not say that I ever saw that being done in the summer time. The water that flowed from the springs between the head-dam of the Nickerson Ditch and the head-dam of the Powers Ditch would be a very small proportion of the 75 inches that I estimated.

Recross-examination.

I did not have any trouble in keeping the flumes of the old Powers Ditch in repair while I was working there. These flumes rotted out quite a while ago. I should think it was in maybe 1906— [291] something like that, that they rotted out. I don't remember any water coming through after that; there might have been, but not to my recollection.

Evidence Introduced by Testimony of A. M. Glover, Called by Defendant.

I am twenty-nine years old and live at Magalia. I have lived there off and on all my life, having been born there. I have worked for the Bader Gold Mining Company—the first time in 1905. They were obtaining their water at that time from the Powers

(Testimony of A. M. Glover.)

Ditch, the amount being about 75 or 100 inches, I should judge, as near as I could estimate.

I have seen the Nickerson Ditch full of water; meaning by that, as holding just as much water as it would hold. I have seen it on the lower bank sloping over. The soil on the upper end of the ditch is mostly bedrock; some of it on the upper end is a little lava, and then it cuts through bedrock and the lower end is lava soil again, I think. The lower end of the ditch was pretty solid. I commenced to work for the Bader company in 1905, and I think I worked during the summer and fall, working about eight months. I was doing all kinds of work for the mining company when I was there, blasting and running car and once in awhile cutting timbers. During the most of the time I was there, there were six men working; sometimes there were two shifts which would be four men and the blacksmith. We were washing in gravel, washing whenever there was any gravel to wash. The time that I saw the Nickerson Ditch overflow was in the winter time. Whenever there would be a hard rain storm the ditch would overrun before anybody could stop it.

The character of the soil on the ditch between the Nickerson head-dam and the spillway is bedrock and lava. I am [292] pretty sure that most of the middle of it cuts through a bedrock point and where it comes out on the creek it gets on lava and when it gets down toward the lower end it gets on lava; by that I mean the lower end as you go down toward the spillway. Between the Nickerson head-gate

(Testimony of A. M. Glover.)

and the spillway it is all lava soil except where it passes through the point of bedrock. I fix the time that I worked at the Bader mine as being shortly prior to the time that I was married. I was married just when I was 21.

Evidence Introduced by Testimony of George B. Mowry, Recalled for Defendant.

These (referring to certain documents handed to the witness) are payrolls covering the period from October, 1905, to May 31st, 1908. They are in my handwriting with the exception of the signature, where the men signed when I paid them. The column on the left contains the names of the men that worked at the mine; the next columns the number of days, the next occupation, the next amount due, and the last column receipts signed by the men. The men were paid by check and upon the payment they signed their name on the last column. After May 31st, 1908, I changed my system by drawing orders on L. Cohn & Co. and gave the men the orders and they would take them to the store and L. Cohn & Co. would cash them and return them to me, and vouchers with the bills. I have looked through this package (referring to a package handed him) and these are the vouchers I referred to. These drafts were drawn by me for the Bader Mining Company. These (referring to another package of papers) are receipts for labor in the mine. I know the signature of C. W. Bader and G. E. Manore that appear thereon, and they were signed in my presence when I paid them. The

(Testimony of George B. Mowry.)

drafts also were for labor in the mine. [293]

(Thereupon there was introduced in evidence as Defendant's Exhibit "F," 16 pay-rolls of the defendant Bader Gold Mining Company, extending from the month of October, 1905, to the month of May, 1908, from which the following appeared:)

That in the month of October, 1905, 8 men were employed by defendant at the mine at a total expenditure for labor, including cash and board, of \$543.10;

That during the month of November, 1905, 7 men were employed at the mine at a total expenditure for labor, including cash and board, of \$444.93;

That during the month of December, 1905, 6 men were employed at the mine at a total expenditure for labor, including cash and board, of \$398.90;

That during the month of February, 1906, 8 men were employed at the mine at a total expenditure of \$903.11;

That during the month of March, 1906, 8 men were employed at the mine at a total expenditure of \$1000.05;

That during the month of April, 1906, 7 men were employed at the mine at a total expenditure of \$266.25;

That during the month of September, 1906, 3 men were employed at the mine at a total expenditure of \$209.86;

That during the month of February, 1907, 2 men were employed at the mine at a total expenditure of \$309.62;

That during the month of March, 1907, 5 men were employed at the mine at a total expenditure of \$385.00;

That during the month of May, 1907, 5 men were employed at the mine at a total expenditure of \$516.65;

That during the month of July, 1907, 4 men were employed at the mine at a total expenditure of \$437.10;

That during the month of September, 1907, 3 men were employed at the mine at a total expenditure of \$299.37;

That during the month of December, 1907, 5 men were employed at the mine at a total expenditure of \$490.38;

That during the month of February, 1908, 5 men were employed at the mine at a total expenditure of \$541.12;

That during the month of April, 1908, 6 men were employed at the mine at a total expenditure of \$659.40;

That during the month of May, 1908, 7 men were employed at the mine at a total expenditure of \$371.45. [294]

**Defendant's Exhibit "G"—Memorandum of Drafts
Drawn on L. Cohn & Co. by Bader Gold Mining
Company.**

(Thereupon a memoranda,—it having been stipulated that the memorandum might be used in place of the documents,—of the drafts drawn on L. Cohn & Co. by the Bader Gold Mining Company for labor

at its mine, was introduced in evidence as Defendant's Exhibit "G," and was as follows:)

No.	Date.	Payee.	Amount.
	1908		
2	July 3rd,	E. Bishop,	\$ 20.00
3	July 3rd,	C. W. Bader,	20.00
4	July 16th,	E. Bishop,	79.00
5	July 16th,	Phil Anderson,	88.00
6	July 22nd,	W. C. Bader,	68.65
7	August 3rd,	C. W. Bader,	120.00
8	August 3rd,	Oscar Moore,	140.00
9	August 3rd,	Foster Perry,	140.00
10	August 3rd,	E. Pfeister,	64.00
11	September 1,	C. W. Bader,	64.00
12	September 1,	E. Pfeister,	64.00
13	September 1,	W. C. Bader,	48.00
14	September 1,	J. W. Bishop,	20.00
15	September 7,	Bert Bates,	15.00
16	October 17,	C. W. Bader,	48.00
17	October 17,	E. O. Richards,	51.00
18	October 17,	W. C. Bader,	51.00
19	October 17,	J. M. Moore,	121.00
20	October 25,	J. M. Moore,	30.00
21	November 6,	E. O. Richards,	78.00
22	November 6,	W. C. Bader,	63.25
23	November 6,	C. W. Bader,	51.15
24	November 24,	Bert Bates,	67.56
25	December 7,	C. W. Bader,	59.25
26	December 7,	W. C. Bader,	59.25
27 (1909)	April 18,	J. Moore,	10.00
28	April 24,	C. W. Bader,	99.60

No.	Date.	Payee.	Amount.
29	April 24,	E. Bishop,	76.20
30	April 24,	W. C. Bader,	13.45
31	May 26,	C. W. Bader,	70.00
32	May 26,	E. Bishop,	70.00
33	July 10,	C. W. Bader,	60.00
34	July 10,	E. Bishop,	70.00
35	July 10,	W. C. Bader,	26.90
36	August 8,	C. W. Bader,	56.50
37	August 8,	E. Bishop,	49.80
38	August 8,	W. C. Bader,	22.75
39	August 8,	J. Moore,	10.50
40	September 15,	C. W. Bader,	96.90
41	September 15,	Ben Hendrix,	64.60
42	December 18,	C. W. Bader,	70.00
43	December 18,	Ben Hendrix,	70.00
44 (1910)	April 15,	C. W. Bader,	19.25
45	April 17,	W. C. Bader,	31.30
46	April 17,	N. Perry,	45.25
47	May 15,	C. W. Bader,	70.00
48	May 15,	W. C. Bader,	70.00
49	May 15,	E. Pfeister,	70.00
50	May 16,	N. Perry,	65.00
51	May 17,	F. Burt,	70.00
52	May 18,	H. Williams,	70.00
53	May 18,	F. Mugford,	70.00
54	June 19,	C. W. Bader,	30.00
55	June 19,	W. C. Bader,	70.00
56	June 19,	E. Pfeister,	70.00
57	June 19,	F. Burt,	70.00

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No.	Date.	Payee.	Amount.
58	June 19,	N. Perry,	\$ 70.00
59	June 19,	H. Williams,	70.00
60	June 21,	Tom Mugford,	70.00
61	June 29,	W. C. Bader,	70.00
62	July 1st,	C. W. Bader,	16.50
63	July 1st,	W. C. Bader,	8.10
64	July 1st,	E. Pfeister,	43.05
65	July 1st,	F. Burt,	32.30
66	July 1st,	N. Perry,	45.75
67	July 1st,	H. Williams,	29.60
68	July 1st,	Tom Mugford,	21.50
69	July 3,	B. L. Eastman,	5.00
70	August 1st,	H. Williams,	35.00
71	August 1st,	E. Pfeister,	61.90
72	August 1st,	F. Burt,	61.90
73	August 1st,	E. Richmond,	33.65
74	August 1st,	R. Wilson,	32.30
75	August 1st,	E. Richards,	41.56
76	August 3rd,	N. Perry,	72.70
77	August 3rd,	C. W. Bader,	67.30
78	August 3rd,	W. C. Bader,	67.30
79	September 7,	C. W. Bader,	70.00
80	September 7,	W. C. Bader,	48.45
81	September 7,	R. Wilson,	40.40
82	September 7,	J. O. Wilson,	43.05
83	October 16,	R. Wilson,	73.90
84	October 16,	C. W. Bader,	70.00
85	October 23,	W. C. Bader,	75.25
86	November 19,	W. C. Bader,	59.25
87	November 19,	W. C. Bader,	70.00

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No.	Date.	Payee.	Amount.
88	November 19,	R. Wilson,	70.00
89	December 8,	C. W. Bader,	25.00
90	December 21,	C. W. Bader,	15.40
91	December 21,	R. Wilson,	55.20
92	December 21,	W. C. Bader,	24.25
93	December 21,	E. Richards,	16.15
94 (1911)	January 30,	C. W. Bader,	70.00
95	January 30,	W. C. Bader,	70.00
96	March 11,	C. W. Bader,	70.00
97	March 11,	W. C. Bader,	70.00
98	April 8,	J. Moore,	25.00
99	April 8,	C. W. Bader,	43.10
100	April 8,	W. C. Bader,	74.30
101	April 8,	C. Hendrix,	37.70
102	May 10,	C. Hendrix,	70.00
103	May 10,	C. W. Bader,	70.00
104	May 11,	W. C. Bader,	70.00
105	May 11,	Joe Moore,	15.00
106	May 23,	Joe Moore	25.75
107	June 14,	C. Hendrix,	70.00
108	June 14,	C. W. Bader,	70.00
109	June 14,	W. C. Bader,	70.00
110	July 2,	John Petersen,	32.30
111	July 16,	C. Hendrix,	75.40
112	July 18,	C. W. Bader,	72.70
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113	July 18,	W. C. Bader,	\$ 37.70
114	July 18,	Geo. McClain,	20.00
115	September 10,	C. Hendrix,	70.00
116	September 10,	W. C. Bader,	70.00
117	September 11,	C. W. Bader,	70.00

No.	Date.	Payee.	Amount.
118	September 20,	Geo. Manore,	59.25
119	September 20,	E. Richmond,	59.25
120	October 7,	Charles Hendrix,	70.00
121	October 15,	C. W. Bader,	70.00
122	October 15,	W. C. Bader,	70.00
123	October 20,	J. Moore,	30.50
124	November 20,	C. W. Bader,	70.00
125	November 20,	W. C. Bader,	70.00
126	November 20,	Edgar L. Richmond,	70.00
127	December 16	C. W. Bader,	67.30
128	December 16,	W. C. Bader,	13.45
129	December 16,	E. Richmond,	67.30
130	December 16,	Tom Henderson,	32.30
131	December 16,	Tom Erwin,	5.40
132	December 16,	J. Moore,	27.56
133 (1912)	February 3,	Geo. B. Mowry,	10.00
134	April 21,	C. A. Canfield,	70.00
135	April 21,	W. C. Bader,	70.00
136	April 21,	Geo. Manore	40.00
137	April 22,	Geo. McLain,	40.00
138	May 19,	C. A. Canfield,	65.60
139	May 25,	J. Woodruff,	10.80
140	May 26,	W. C. Bader,	70.00
141	May 26,	Geo. Manore,	40.00
142	June 30,	W. C. Bader,	70.00
143	June 30,	C. Hopkins,	70.00
144	June 30,	Geo. Manore,	44.25
145	June 30,	J. Moore,	32.50
146	July 8,	Tom Erwin,	13.50
147	July 27,	W. C. Bader,	72.70

No.	Date.	Payee.	Amount.
148	July 27,	Geo. Manore,	75.40
149	July 27,	C. Hopkins,	70.00
150	July 27,	J. Moore,	7.50
151	July 27,	O. Warron,	12.50
152	July 27,	C. McLain,	22.85
153	September 6,	W. C. Bader,	61.90
154	September 6,	Geo. Manore,	70.00
155	September 6,	C. Hopkins,	70.00
156	October 12,	W. C. Bader,	70.00
157	October 12,	Geo. Manore,	70.00
158	October 12,	C. Hopkins,	70.00
159	October 21,	J. Moore,	7.50
160	November 10,	W. C. Bader,	70.00
161	November 10,	Geo. Manore,	70.00
162	November 10,	C. H. Hopkins,	70.00
163	December 14,	J. Moore,	20.00
164	December 15,	W. C. Bader,	67.30
165	December 15,	C. Hopkins,	67.30
166	December 15,	Geo. Manore,	70.00

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**Plaintiff's Exhibit "H"—Receipts for Payments of
Labor Done at Mine.**

(Thereupon a number of receipts for payments for labor done at the mine were introduced in evidence as Plaintiff's Exhibit "H." These receipts were as follows):

- 1 receipt of W. C. Bader for \$91.50, dated February 23, 1909.
- 2 receipts of C. W. Bader,—one dated February 23, 1909, for \$94.20; and one dated December 19th, 1909, for \$43.05.

7 receipts signed by G. E. Manore,—one dated October 26th, 1911, for \$70.00; one dated December 2d, 1911, for \$70.00; one dated December 13th, 1911, for \$20.30; one dated February 3d, 1912, for \$32.40; one dated April 21st, 1912, for \$30.00; one dated May 26th, 1912, for \$30.00; and one dated June 20th, 1912, for \$25.27.

(There was thereupon introduced in evidence as Plaintiff's Exhibits 6 and 7, respectively, certified copies of the Assessment-Rolls of Butte County for the years 1888 to 1913, from which the following appeared:)

That in the years 1889 the property described as "7 miles of ditch" in Road District 10, Powellton School District, in the County of Butte, was assessed to A. A. Nickerson, and the taxes levied thereon duly paid;

That in the years 1891, 1892, 1893, 1894, 1895, 1896 and 1897, the property described as "7 miles of ditch," in Road District 10, Paradise School District, in the County of Butte, was assessed to Frank McLaughlin, and the taxes levied thereon duly paid;

That in the year 1898 the property described as "7 Miles of ditch" in Road District 10, Paradise School District, County of Butte, was assessed to R. L. Cutting, and the taxes levied thereon duly paid;

That in the years 1899 and 1900, the property described as "Nickerson Ditch" in Road District 10, Paradise School District, County of Butte, was assessed to the Oroville Water Company, and the taxes levied thereon duly paid;

That in the year 1901 the property described as

“Water Ditch (Nickerson Ditch)” in Road District 10, Paradise School District, County of Butte, was assessed to Oroville Water Company and the taxes levied thereon duly paid;

That in the years 1902 and 1903 the property described as “Nickerson Ditch $2\frac{1}{2}$ miles” in Road District 10, Magalia School District, the property described as “Nickerson Ditch 2 miles” in Road District [298] 10, Paradise School District, and the property described as “Nickerson Ditch $\frac{1}{4}$ mile” in Road District 10, Kunkle School District, was assessed to Oroville Water Company and the taxes levied thereon duly paid;

That in the years 1904 and 1905 the property described as “ $2\frac{1}{2}$ miles of Ditch (Nickerson Ditch)” in Road District 10, Magalia School District, County of Butte; the property described as “2 miles of ditch (Nickerson)” in Road District 10, Paradise School District, and the property described as “ $\frac{1}{4}$ mile of ditch (Nickerson)” in Road District 10, Kunkle School District, was assessed to Oroville Water Company, and the taxes levied thereon duly paid;

That in the years 1906 and 1907 the property described as “ $2\frac{1}{2}$ miles of ditch (Nickerson Ditch)” in Road District 10, Magalia School District, “2 miles of ditch (Nickerson)” in Road District 10, Paradise School District, and “ $\frac{1}{4}$ mile of Ditch (Nickerson)” in road District 10, Kunkle School District, was assessed to Oro Water, Light and Power Company, and the taxes levied thereon duly paid;

That in the years 1908, 1909, 1910, and 1911, the

(Testimony of George B. Mowry.)

property described as "Nickerson Ditch $2\frac{1}{2}$ miles" in Road District 10, Magalia School District, "Nickerson Ditch Extension $1\frac{1}{2}$ miles," Road District 10, Magalia School District, "Nickerson Ditch 2 miles" in Road District 10, Paradise School District, and "Nickerson Ditch $\frac{1}{4}$ mile" in Road District 10, Kunkle School District, was assessed to Oro Water, Light and Power Company, and the taxes levied thereon duly paid;

That in the years 1912 and 1913 the property described as "Nickerson Ditch 2 miles" Road District 10, Para. School District; the property described as "Nickerson Ditch $2\frac{1}{2}$ miles" Road District 9, Magalia School District; the property described as "Nickerson Ditch Extension $1\frac{1}{2}$ miles" Road District 10, Magalia School District, and the property described as "Nickerson Ditch $\frac{1}{4}$ mile" in Road District 10, Kunkle School District, was assessed to Oro Water, Light and Power Company, and the taxes levied thereon duly paid. [299]

I know Barney Landers. He never came to collect any bill for water or anything like that. I employed him to attend to the head-gate at the head-dam, opening the water-gate in regard to the turning of water in. I paid him \$7.50 a month for that. That was in 1892, 1893, 1894 and 1895.

I remember instructing Ed Bishop to open and shut the gate at the spillway so as to leave it open for twenty or thirty minutes and then shut it again. That was in 1909. If you remember, on New Year's Eve, 1909, we had some very heavy storms, from there

(Testimony of George B. Mowry.)

on, two or three months, we had an immense cave, where I had to hydraulic, the bank had all come down and had covered up all my tunnels; there was about 60 feet of debris that was in there, and I started a new tunnel in March, 1909, and when they were working inside, under ground, and they would shoot, use powder, they had to come out because they could not work during the powder smoke, and they would break up rocks and such as that in the cave, and then we would sluice it out, turn on the water and sluice it out. My instructions to Mr. Bishop were to go up to the gate, raise it up, and let the water run for about 20 minutes, and then close the gate down—to raise my gate in the spillway and put the gate in on the other side to turn the whole ditch down, and then put my gate in and close it, and lift the other gate to let the water run down the ditch, so that the men could have a chance to break up the big rocks to get ready for the sluicing—put the gate down for 20 minutes and then open my gate, that he should open my gate and put that gate in the ditch and turn the water all down for 20 minutes—and we kept that up all day. It took us over a month to sluice the stuff out. I never remember an occasion except when we were clearing away this rock that I shut the water off intermittently and turned it on. We always turned it on in the morning and left it all day until quitting time at night. [300]

I have been over the pathway along the berm of the Nickerson Ditch between the Nickerson head-dam and the spillway; the path is solid. I have seen the ditch running right up the top of the berm. I

(Testimony of George B. Mowry.)

have seen the water running over the top of the berm during the storms. I have seen the water running at an even, steady run about six or eight inches from the top. I have seen the highest water there in the month of March.

I have heard Mr. Lincoln testify. I once asked him to close the gate at my spillway and he said he would. Mr. Newman and I were coming up from the mine, and we came up the trail, but we didn't go up where the gate was; I was going to close it down as I came by, but I forgot it. We came along the trail and we met Mr. Lincoln right on the ditch, there, so I spoke to him, said, "Good evening," and I asked him, I says, "Mr. Lincoln, as you go by, will you please close my gate down, so that the water can run down to Paradise for the benefit of the farmers?" He says, "Yes." That was all. I walked along.

I remember that William Hendrix worked for me at the time I put in the flume along the Powers Ditch. I do not remember of having a conversation with him to the effect that I was putting the flume and dam in there for the purpose of getting winter water; to save buying water during the winter. I never had such a conversation with him. I told him the reason I was putting that dam in there was so that I would be certain of having water always for drifting with, because I said, "My contract with Major McLaughlin will expire this year, and I may not be able to get the ditch again, but I want to secure water." That was in 1898, when I had a talk with Major McLaughlin,

(Testimony of George B. Mowry.)

Cross-examination. [301]

“Q. You have said that in 1898 Major McLaughlin gave you the use of the ditch?

A. In 1897 and 1898—in 1897, I first spoke about it, and in 1898 and 1899 I had the use of the ditch there.

Q. Didn't you testify here the other day that Major McLaughlin let you have the use of the water?

A. Major McLaughlin let me have all the water in the ditch.”

WITNESS.—(Continuing.) I did not pay any consideration for it. That was before I claimed [302] any water in Little Butte Creek. The next year, 1899, I filed on Little Butte. At this time the upper end of the Powers Ditch was out of commission.

“Did you mean to say when you said the Powers Ditch was abandoned, that the lower end was abandoned at that time?

A. I don't know anything about the lower end. I only know about it from there up to the head-dam.

Q. Don't you know that the lower end of the Powers Ditch is connected with the Nickerson Ditch by a lateral? A. I do not.

Q. Did you mean to say that you did not know the locality south of the spillway where the water from the Nickerson Ditch is transferred over to the lower end of the Powers Ditch?

A. I was not even along it, never have been down the Nickerson Ditch to that point. I don't think it would be safe to run the water in the Nickerson

(Testimony of George B. Mowry.)

Ditch right up to the berm. I have seen it run up on the top of the berm and I have seen it running three or four inches from the top. The water can be safely run, I should judge, within eight inches of the top; the same place would be eight inches from the top. I have known it to run higher than that even, on the bank, without it getting out, but at that time I was hurrying to close the head-gate. It is a dangerous situation when the water is flowing over the bank. The ditch would have gone out if I had not gone up and closed the gate. In 1899 when I filed on Little Butte I was getting my water out of the Nickerson Ditch under the agreement with McLaughlin. I built my dam and put in my ditch in 1899; I filed on it in March. I told Hendrix that I was putting the dam in so as to have a certainty of water. After I had rehabilitated the Powers Ditch, I got [303] sufficient water through it in the summer time for the mine. I started hydraulicing in 1900 and continued until the latter part of 1904 or the first part of 1905. I required for hydraulicing all the water I could get. I would use all the way from 500 to 1,000 inches of water. The minimum amount I could use was probably 500 inches. There are times of the year when there is not 500 inches of water in the Nickerson Ditch. In the winter time there was that quantity up until April or May, and there was probably less than 500 inches during June, July and August, up to the time it started to storm again. Some time I have seen it start storming in September so

(Testimony of George B. Mowry.)

that I could start working in that month, and I have seen it when I was not able to work until February, when I was hydraulicking. [304]

At this point there was introduced in evidence, without objection, certain documents and instruments as follows:

Plaintiff's Exhibit 12, a Notice of Appropriation, as follows:

"We the undersigned take up and claim the right of the water for ditching & Mining purposes, commencing at the falls about one-half mile below Neals Mill on Little Butte Creek to run said water down on the west side of the branch to our mining claims.

February 2d, 1859.

L. BRUIN,

CHARLES DELAPLAIN,

Filed for record Feby. 5th, 1859, 11½ o'clock A. M., at request of C. Delaplain, Esq.

JOHN F. KIMMEL,

Co. Recorder.

By W. I. Burnside,

Deputy."

Defendant's Exhibit "I," a series of deeds as follows:

A deed from Charles Delaplain dated March 14, 1888, recorded March 16, 1888 in Liber 30 of Deeds at page 36, records of Butte County, conveying and granting and confirming unto A. A. Nickerson the following described property:

“All his right, title and interest in and to the Ditch and water right, heading on Little Butte Creek at the foot of the old Kinson mill dam in Sec. (36) thirty-six, Township twenty-three (23) North Range three (3) East, and crossing part of Sections one (1) and two (2) and the old Neal road near the northeast corner of Section eleven (11) Township twenty-two (22) North, Range three (3) east and continuing on in a south-easterly course, the property being known as the old Delaplain ditch together with the water and water rights appertaining thereto, the above described property being situate in Butte County, State of California. Together with all and singular the tenements * * .”

A deed from C. C. Slocum and R. Shipley to A. A. Nickerson, dated June 29, 1888, recorded July 13, 1888 in Liber 30 of Deeds at page 383, Records of Butte County, granting and conveying in consideration of a deed of conveyance of even date to the party of the first part, 15 inches of water, miner's measurement, the following described property:

“All the right, title and interest of the parties of the first part in and to the ditch and water right heading on Little Butte Creek at the foot of the old Kinson Mill dam in Section (36) thirty-six, Township (23) twenty-three north, Range (3) Three east, Mount Diablo Meridian, and crossing part of Sections one (1) and two (2) and the old Neal road near the northeast corner of Section (11) eleven, Township (22) twenty-two north, Range (3) east, Mount Diablo Meridian, and continuing on in a south-easterly course.

The property hereby conveyed being known as the old [305] Delaplain Ditch, in Butte County, together with the water and water rights appertaining to said Ditch.

Together with the right of way through all lands controlled by the said parties of the first part and all labor done by the said parties of the first part upon said ditch, also the right to enlarge the said ditch wherever the same crosses lands owned by or controlled by the said parties of the first part, until the same ditch shall have a carrying capacity of (2000) two thousand miner's inches, with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and reversion and reversions, remainder and remainders, rents, issues and profits thereof."

A deed from A. A. Nickerson to Frank McLaughlin, dated July 15, 1890, and recorded July 16, 1889, in Liber 33 of Deeds, page 397, records of Butte County, granting and conveying the property described as follows:

"That certain ditch and water right taken from the west branch of the Feather River at a point nearly opposite the village of Inskip and about five miles above Powell's said ditch running thence in a southwesterly direction for about 8 miles to its terminus at or near Hasty's mill; said ditch conducting the water by ditch and flume on top of and across the Dog-town Ridge; said ditch being commonly and generally known as the Snow ditch, also all additions to said ditch made by the party of the first part or his grantors to convey the waters thereof to or

near Paradise, and all rights which the party of the first part has or may have obtained under a certain deed dated the 14th day of March, 1888, from Charles Delaplain to the party of the first part, recorded in Volume 30 of Deeds, page 36, Butte County Records. Also by a certain deed from the Magalia Consolidated Mining Company to A. A. Nickerson recorded in Book 30 of Deeds, Butte County Records, page 30, so far as the same appertain to said water rights, together with all appurtenances, rights of way, additions, extensions, head-dams, flumes and improvements on said ditch or any part thereof."

A deed from Frank McLaughlin and Margaret McLaughlin, wife of Frank McLaughlin, of the County of Butte, State of California, and the Thermalito Colony Company, a corporation of the State of California, to Walter Cutting of Pittsfield, State of Massachusetts, dated October 4th, 1897, and recorded October 9th, 1897, in Liber 48 of Deeds at page 77, records of Butte County, granting and conveying among other property the following:

"First Parcel: Being the Snow Ditch and Nickerson Ditch and described in that certain deed from A. A. Nickerson to Frank McLaughlin recorded in Book 33 of Deeds, page 397, in the office of the Recorder of Butte County, as follows, to wit: That certain ditch and water right taken from the west branch of Feather River at a point nearly opposite the village of Inskip, and about five miles above Powell's, said ditch running thence in a southwesterly direction for about eight miles to its [306]

terminus at or near Hasty's mill; said ditch conducting the water by ditch and flume on top of and across the Dogtown Ridge; said ditch being commonly and generally known as the 'Snow Ditch; also all additions to said ditch made by the party of the first part or his grantors to convey the waters thereof to or near Paradise, and all rights which the parties of the first part has or may have obtained under a certain deed dated the 14th day of March, 1888, from Charles Delaplain to the party of the first part, recorded in Vol. 30 of Deeds, page 36, Butte County records, also by a certain deed from the Magalia Consolidated Mining Company to A. A. Nickerson, recorded in Book 30 of Deeds, Butte County Records, page 30, so far as the same appertains to said water rights; together with all appurtenances, rights of way, additions, extensions, head-dams, flumes and improvements on said ditch or any part thereof.

Fourth Parcel: Also all the rights of way and privileges and property rights conveyed to Frank McLaughlin by deed from W. H. McKay, recorded in Book 46 of Deeds, Butte County Records, page 389, and described as being a right of way on over and across all those certain lots, pieces or parcels of land situate, lying and being in the County of Butte, State of California, and bounded and particularly described as follows, to wit: N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Sec. 19; S. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 8; N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 17; S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 18; all in Tp. 24 N., R. 4 E., M. D. M.; to maintain, erect, construct, repair and operate a

ditch or ditches for the purpose of conveying water from the west branch of Feather River across said land. The line of said ditch or ditches to conform to the lines and sizes of the 'Old Snow Ditch' and 'Old Hendricks Ditch' together with the right of way over said lands for the purpose of repairing and maintaining said ditches; the object of this conveyance being to grant to and confirm to said McLaughlin the title to said Snow and Hendricks ditches now claimed by said McLaughlin across and on said lands, provided always that the party of the first part reserves to himself the right to use six miner's inches of water from the 'Old Snow Ditch' whenever the water is flowing in said ditch, in addition to all water rights now owned and claimed by said party of the first part in and to the waters of Kanaka Creek.

Together with all the rights, privileges and appurtenances and all and everything belonging to said properties and the whole thereof."

A deed from Walter Cutting and Maria Center Cutting, Elton O'Connell and Agnes L. O'Connell, all of Pittsfield, Massachusetts, to the Oroville Water Company, a corporation of the State of California, dated April 30th, 1898, and recorded July 25th, 1898, in Liber 30 of Deeds, at page 363, Records of Butte County, granting and conveying among other property the following:

"All the right, title, claim and interest of the said parties of the first part, in and to that certain property, being the Snow Ditch and Nickerson Ditch and described in that certain deed from A. A. Nickerson

to [307] Frank McLaughlin, recorded in Book 33 of Deeds page 397, in the office of the Recorder of Butte County as follows, to wit: That certain ditch and water right taken from the west branch of Feather River at a point nearly opposite the village of Inskip, and about five miles above Powells; said ditch running thence in a southwesterly direction for about eight miles to its terminus at or near Hasty's mill said ditch conducting the water by ditch and flume on top of and across the Dogtown Ridge said ditch being commonly and generally known as the Snow Ditch; also all additions to said ditch made by the said party of the first part (A. A. Nickerson) or his grantors to convey the waters thereof to or near Paradise, and all rights, which the said A. A. Nickerson had or may have obtained under a certain deed dated the 14th day of March, 1888, from Charles Delaplain to the said Nickerson recorded in Vol. 30 of deeds, page 36, Butte County records, also by a certain deed from the Magalia Consolidated Mining Company to A. A. Nickerson recorded in Book 30 of Deeds, Butte County Records, page 30, so far as the same appertain to said water rights, together with all appurtenances, rights of way, additions, extensions, head-dams, flumes and improvements on said ditch, or any part thereof.

Also all the right, title, claim and interest of the parties of the first part in and to all the rights of way, and privileges and property rights conveyed to Frank McLaughlin by deed from W. H. McKay, recorded in Book 46 of Deeds, Butte County records, page 389, and described as being a right of way on,

over and across all those certain lots, pieces or parcels of land situate, lying and being in the County of Butte, State of California and bounded and particularly described as follows, to wit:

N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Sec. 19; S. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 8; N. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 17; S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 18, all in Tp. 24 N., R. 4 E., M. D. M., to maintain, erect, construct, repair and operate a ditch or ditches for the purpose of conveying water from the west branch of Feather River across said land. The line of said ditch or ditches to conform to the lines and sizes of the 'Old Snow Ditch' and 'Old Hendricks Ditch,' together with the right of way over said lands for the purpose of repairing and maintaining said ditches; the object of this conveyance being to grant to and confirm to said McLaughlin the title to said Snow and Hendricks Ditches now claimed by said McLaughlin across and on said lands, provided always that the party of the first part reserves to himself the right to use six miner's inches of water from the 'Old Snow Ditch' whenever the water is flowing in said ditch in addition to all water rights now owned and claimed by said party of the first part in and to the waters of Kanaka Creek. Together with all the rights, privileges and appurtenances and all and everything belonging to said properties, and the whole thereof." [308]

Plaintiff's Exhibit No. 8.

A deed from Oroville Water Company, a corporation, of the State of California, to the Oro Water,

Light & Power Company, a corporation of the State of California, dated August 15th, 1905, and recorded August 26th, 1905, in Liber 83 of Deeds at page 275, records of Butte County, granting and conveying, among other property, the following:

“Also all the right, title, claim and interest which the said party of the first part now has or may hereafter acquire in and to that certain property known as the Hendricks Ditch; Also all the right, title, claim and interest which the said party of the first part may now have or may hereafter acquire in and to that certain property known as the Snow Ditch and Nickerson Ditch and described in that certain deed from A. A. Nickerson to Frank McLaughlin, recorded in Book 33 of Deeds, page 397, Records of Butte County; Also all that certain ditch and water right known as the Nickerson Ditch conveying water from Little Butte Creek near the town of Magalia to the town of Paradise in said County of Butte; Also all right, title and interest which the party of the first part now has or may hereafter acquire to that certain water ditch in Kimsheew, Oregon, and Hamilton Townships, County aforesaid, formerly known as the Walker and Wilson Ditch, and now known as the West Ditch.

Also all the right, title and interest which said party of the first part may now have or may hereafter acquire in and to that other certain water ditch in said Hamilton Township, County aforesaid, formerly known as the H. B. Sarle & Co. ditch and afterwards as the Austin Ditch and all such right, title and interest which said party of the first part

may now have or may hereafter acquire in and to that certain other water ditch in said township known as the Thompson Ditch. * * *

Said ditches, water rights and rights of way are more particularly described in that certain mortgage or deed of trust made and executed by the Oroville Water Company, a corporation, to N. D. Rideout, Ed. Harkness and A. F. Jones, trustees, on or about the 6th day of June, 1898, and recorded in the office of the County Recorder of said County of Butte, in Liber 32 of Mortgages, at page 246, and following thereof; it being the intention hereof to convey all water rights, ditches, flumes, pipes and conduits described in said mortgage or deed of trust or which may now be owned or possessed by said party of the first part. * * *

And also all the right, title, claim or interest which said party of the first part now has or may hereafter acquire to all those certain rights of way in Butte County, State of California, and the privileges and property rights conveyed to Frank McLaughlin by deed from W. H. McKay, recorded in Book 46 of Deeds, Butte County Records, page 389.

Also all the right, title, claim and interest which the said party of the first part now has or may hereafter acquire [309] in and to all the rights of way, privileges and water rights conveyed by W. H. McKay to Frank McLaughlin by deed recorded in Book 45 of Deeds, Butte County Records, at page 98.

All of the foregoing ditches, pipes, pipe-lines and flumes and rights of way are situate in the County of Butte, State of California, and have long belonged to the first party.

Together with all other ditches, rights of way, pipe-lines, reservoirs, water rights, conduits and flumes belonging to said first party in the County of Butte, State of California.”

Plaintiff's Exhibit No. 9.

A deed from Oro Water, Light & Power Company, a corporation, of the State of California, dated March 12th, 1912, to the Oro Electric Corporation, of the State of California, recorded on May 25, 1912, in Liber 130 of Deeds at page 235, Butte County Records, conveying among other property, the following:

“Also that certain water right and dam known as the Nickerson head-dam whereby water is taken from Little Butte Creek near the Town of Magalia in Section 36, Township 23 N., R. 3 E., M. D. M., in Butte County, California; and the conduit conducting said water thence to Kunkle Reservoir in Section 31, Township 22, N., R. 3 E., M. D. M., in Butte County, California; and the conduit conducting said water thence to Kunkle Reservoir in Section 31, Township 22 N., R. 4 E., M. D. M., in Butte County, California.

“Also all and singular the plants, electric works, water, power works, power houses or other stations or buildings for the generation, transmission, or storage of power or electricity, and the fixtures, fittings and equipment thereof, including all dynamos, engines, boilers, machinery, regulators, meters, converters, switchboards, shafting, belting and other appliances, and all lines, mains, feeders, poles, mast arms, brackets, cables, wires, insulators, lamps, lamp

sockets, house wiring connections, and electric fixtures of every kind and nature whatsoever. [310]

Evidence Introduced by Testimony of E. H. Bickford, Called by Defendant.

I am sixty-one years old and reside in Chico at the present time. I don't remember the time that I commenced to work for the Oro Electric Corporation or the Oroville Water Company, but I was in the ditch business for over twenty years, employed in the same system. I quit working for the company in 1909. I know where the Nickerson Ditch is and during the latter part of the time I was with the company I had charge of the whole ditch system.

I remember a man by the name of Murphy doing work on the Nickerson Ditch. Subsequent to the time that this work was done by Murphy I remember that Mowry took water out of the Nickerson Ditch for the Bader Mine. At that time Mr. Durbrow was manager or superintendent of the company. I remember the one occasion of notifying him that Mr. Mowry was taking the water out of the ditch. Mr. Merrill was ditch-tender at the time.

It was about 1907 and 1908 that I was superintendent of ditches for the company. Prior to that time, in 1905 and 6, I had general supervision of the work and constructing the reservoir at Kunkle. I don't remember how long after Murphy worked on the ditch that Mowry took the water. I don't think I had charge of the system after it was cleaned out; not until about two years before the time I quit the company.

(Testimony of E. H. Bickford.)

I remember having a talk with C. W. Bader on the ditch at Mowry's flume. There was nobody else there at the time and as I remember it I shut the water off and he said he would put it on again. He did not turn it on while I was there, to my knowledge. Nothing else was said that I remember now.

I have been along the path on the ditch from the head-dam down frequently. There is a well-beaten path along the [311] lower berm of the ditch. I do not remember of seeing the water up to four or five inches of the top. I saw a cross-gate below the Mowry spillway while I was working for the company. I recall at flume just below the head of the Nickerson Ditch in which I put a weir; that is, in the first flume below the head-dam, and by a weir I mean a place to measure out water; miner's measurement. I put the weir in under the company's instructions. I think Mr. Durbrow was manager at that time. The company instructed me to turn out a certain amount of water down to the creek, in the summer season.

I remember the old Thompson Flat or Powers Ditch. This ditch was not used by the company that I was working for after 1890. I don't remember when the Oro Water, Light & Power Company took the ditch over but I was working on this same system.

Q. Pursuant to those instructions, Mr. Bickford, did you let the water during the summer time out of that weir? A. Yes.

Cross-examination.

“Q. Mr. Bickford, when did you first start to

(Testimony of E. H. Bickford.)

work on the Nickerson Ditch?

A. I never worked on the Nickerson Ditch until I took charge of it—that is, I did work at different times, go over there from the Miocene and do work. Now I don't remember—it seems to me in 1903 I did some work on the head-dam of it, I think it was. I would not be positive."

The WITNESS.—(Continuing.) I quit the company in 1909 and have been blacksmithing. I have done no ditch-tending since that time. My memory about dates is poor. It is hard for me to place it. I could not tell positively what year the work was done in. I kept no memorandum. I am not able to recollect definitely when these things took place. I could not tell just how long before 1909 I first entered the employ of [312] the water company. I was working there when Mr. Durbrow came. I had charge of the Nickerson Ditch, as I remember it, for two years before I quit the company.

"Q. How long prior to the time that Mr. Durbrow came up were you working?

A. I worked from 1908 up to—

The MASTER.—Q. You mean 1898? A. 1888.

Q. 1888? A. I commenced work on the ditch—

Mr. ORRICK.—Q. That is when it was built, in 1888?

A. No it was reconstructed that year.

Q. It was reconstructed in 1888?

A. No, it was built.

Q. You are talking about the Miocene?

A. The Miocene; I was working for the company;

(Testimony of E. H. Bickford.)

you asked me when I commenced working for the company.

Q. Perhaps I did not make it clear. What I am trying to get at is how long you were working on the Nickerson Ditch before 1909 when you quit?

A. I had charge of it, I think, as I remember, something like two years—that is, two years before I quit the company.” That would be something like 1907 or 1909. Before that I had been working on the Miocene Ditch where I looked after the upper division. When I was working on the Nickerson Ditch it took water out of Little Butte Creek and carried it in the winter time to Kunkle Reservoir. In the summer time we let the Paradise people have it to irrigate with. They used all the water they could get through in the summer time for irrigating. I do not mean to say that Mr. Durbrow told me to throw away water in the summer time, thus depriving those people at Paradise of water.

The instructions were to let a certain amount of water [313] out of the weir that I referred to, in the summer time.

“Q. Was that when the water was so high that the Nickerson Ditch could not carry it?

A. No, that was at low-water season.

Q. What I am driving at is that since you say that Paradise people needed the water down there in the summer time, why was Mr. Durbrow telling you to throw it away?

Mr. CROSS.—Objected to as immaterial, irrelevant and incompetent and argumentative.

(Testimony of E. H. Bickford.)

The MASTER.—If you know; if you do not know say so.

A. I do not remember what the instructions were—that is, what it was for, but I had instructions to turn out a certain amount of the water.

Mr. ORRICK.—Q. How many years did you turn out a certain amount of water,—both summers of 1907 and 1908?

A. As I remember, that was the instructions.

Q. I want to know what you actually did, Mr. Bickford?

A. Yes, I did. But whether it was running all the time, whether I had a ditch-tender there or not, I could not say; but I turned the water out myself there.

Q. How much water did you turn out?

A. I could not tell just what it was now; I don't remember what the amount was."

I don't recollect whether this was done before 1907 or not. I could not tell now how much water was turned out. The water when turned out went back into Little Butte Creek. I don't know where it proceeded from there. I never went to see. I recollect putting a weir in at Dry Creek which is quite a ways down the Nickerson Ditch below the Bader land. We would turn out with the Nickerson Ditch into Dry Creek the natural flow of Dry Creek. [314]

"Q. Now I want you to be careful about this, Mr. Bickford, and tell us whether or not you are prepared to swear that the water that you turned out was up there at the head-dam of the Nickerson, turn-

(Testimony of E. H. Bickford.)

ing it back into Little Butte, or whether you think it was Dry Creek?

A. I cannot recall now about Dry Creek."

"Q. I want to get, Mr. Bickford, what the fact is with regard to your being able to swear that in the summer time you turned out [315] water from the Nickerson Ditch into Little Butte Creek, and I want to know whether or not as Mr. Durbrow suggests it was not Dry Creek into which you turned that water? A. It was Little Butte Creek.

Q. You swear that it was Little Butte Creek?

A. Yes.

Q. During what months did you turn water into Little Butte Creek from the Nickerson Ditch?

A. During the summer months when the water was low."

The weir was a waste-gate about 3 feet wide. It must have been under Mr. Durbrow's direction that it was constructed. It raised up a certain amount to let the water pass through an opening with a four inch pressure to it. I don't remember how much of an opening I had—the waste-gate was probably that long, and about that wide—I don't remember just the width, what it was.

"Q. You perhaps are confused and I want to get it clear because it is important. You said you constructed under Mr. Durbrow's directions the weir, didn't you?

A. It must have been under Mr. Durbrow's directions; I was working for the company.

Q. Describe that weir that you constructed?

(Testimony of E. H. Bickford.)

A. I don't know just what—there was the width of the gate, and then it was raised up a certain amount and let the water pass through an opening, with a 4-inch pressure to it."

It was not on the new ditch that the weir was constructed, but on the Nickerson Ditch, and it was not that one that was constructed on Dry Creek.

"Q. I want you to describe that weir, Mr. Bickford; just give us how high it was and all about it?

A. I did.

Q. Tell us what work you did on it and maybe we can get at it that way? A. I did describe it.

Q. It was constructed of wood, was it?

A. Yes. [316]

Q. Were there pillars above the weir on each side?

A. There was an opening for the waste-gate placed right down there.

Q. There was a waste-gate there? A. Yes."

The weir was constructed of wood. The flume that the waste-gate was in was 3 feet deep. I do not remember how high above the bottom of the flume the top of the weir was. I could not answer that. The water would raise and lower according to the season. I think I had a 12-inch board for the bottom of the gate and the balance of the boards were loose. They could be taken out or raised just as I wanted. I cannot give the amount of water that I turned out of there. I could not tell whether it was 100 or 500 inches. It was not 500 inches because there was not that amount of water in the creek. I turned out a certain amount of water and carried the rest through,

(Testimony of E. H. Bickford.)

what was there. Mr. Durbrow said he would see about the water turned down; I don't remember what he said to turn it out for. I never went to see where it went. I don't remember the dates. It might have been longer than from 1907 to 1909, but I don't remember.

“Q. You know from 1907 to 1909 Mowry had no head-gate down there where the old Powers Ditch was, don't you?

A. I don't know. I never was there.

Q. You never were there in your life?

A. I never was there after I quit tending that ditch.”

The weir was in the neighborhood of 100 yards or so below the head-dam.

“Q. You are perfectly positive that it was a weir over which this water was turned?

A. My recollection is it was what they call a weir.”

I remember when the Nickerson Ditch was extended to Kunkle Reservoir, though I don't remember the year. As I remember [317] it the ditch was cleaned out. They cleaned out the whole ditch. I had nothing to do with the ditch at that time; of course I don't remember what year it was done in. They did not enlarge the ditch from the spillway on the Bader place up to the head-dam. They only trimmed it up and smoothed and leveled up the bottom; they trimmed off the narrow places, I remember; that is what was done. It has been six years since I have been up on the Nickerson Ditch.

“I don't know whether there is any weir on the

(Testimony of E. H. Bickford.)

Nickerson Ditch to-day. I don't remember whether it was there the last spring that I was there—whether it was still in use or not. The last spring I was there was either 6 or 7 years ago—six years ago. In September, 1909, I think I quit the company, but believe that Mr. Biek, another ditch foreman, had charge of the whole system."

I could not tell what years the Bader Mine was using water out of the Nickerson Ditch or how steady they used it. I remember there was a payment made. I could not tell whether I collected it or whether somebody else collected it. I don't remember how much they were paying for the water. I think it was something like \$30 a month while they were using it. They did not continue as long as I was there; I don't know of but the one month; I can't recollect the time.

The time that I shut off the water from going into the Bader spillway I did so because I thought it belonged to the company. I went up and down the Nickerson Ditch frequently and saw the spillway gate closed down,—closed down so tight that no water would go in. I saw this at different times. I could not say how often. I have shut it. I don't remember only the one time that I shut it when Charlie Bader was there, and I told him that the water belonged to the company, and he says "We want it."
[318]

There was a head-dam built across Little Butte Creek at the Nickerson Ditch, and it stopped the water going down Little Butte Creek in the summer

(Testimony of E. H. Bickford.)

time. I don't know what happened to the Powers Ditch after the water was taken by the Nickerson. I have never been up to the Powers head-dam since 1888.

“Q. But you do know that after the Nickerson head-dam was built, it took all the water down the Nickerson Ditch in summer time?

A. I was trying to think, the first two or three years, when I had charge of it, whether there was any water let out or not. As I remember we used all the water from Butte Creek and ran it through the Nickerson Ditch there until I quit looking after that system. In 1888 I took charge of the Nickerson Ditch and also the Powers Ditch and tended there until we were going to reconstruct the Powers Ditch and there had been lumber hauled from Coal Canyon to the Bader orchard [319] for to reconstruct these Powers flumes on the Powers Ditch, and my time was taken up then on the Miocene Ditch, and there was a number of years there that I had nothing to do with the Nickerson Ditch or the Powers Ditch only to go over there and do work at stated times, when it was necessary. I reconstructed the head-dam on the Nickerson Ditch and then in later years, later on, I put in new flumes on the Nickerson Ditch, and then after that I had charge of the ditch system for a couple of years or so. I don't remember just how long. I took charge from about 1907 to 1909, something like that; I could not swear positively.

“Q. When you took charge of the Miocene and Power Ditch in 1888, you say you reconstructed a

(Testimony of E. H. Bickford.)

part of the Powers Ditch? A. No.

Q. I was wrong then. What did you do?

A. We were going to go to work and reconstruct the flumes, to put in new flumes, had the old lumber here hauled up from Coal Canyon, and then Major McLaughlin makes a deal with Nickerson and takes over the Nickerson Ditch. Then we quit all operations on the Powers Ditch after that.

Q. You mean took over the Powers Ditch.

A. No, he took over the Nickerson Ditch and abandoned the Powers Ditch."

They ceased running water through the Powers Ditch after the Nickerson Ditch was taken over,—somewhere about 1890. The Powers Ditch was then not in use. We had abandoned it down to the top of the hill at Mineral Slide.

"Q. So after 1888, do you know whether the upper portion of the Powers Ditch carried any water?

A. Why certainly, I run water through it.

Q. What years did you run water through it?

A. From 1888 until '89 or '90; I don't remember the year that they reconstructed the [320] Miocene.

The MASTER.—What has the Miocene got to do with it?

A. I am referring to that to get at it.

Q. I thought you said the Powers Ditch was abandoned? A. It was abandoned after that time.

Mr. ORRICK.—When did they cease to run water through the Powers Ditch after the construction of the Nickerson?

(Testimony of E. H. Bickford.)

A. After the company took the Nickerson Ditch over.

Q. About when was that?

A. Somewhere about 1890.

Q. Then the upper portion of the Powers Ditch was not used and fell into disuse, is that it?

A. It was not in use; we had abandoned it down to the top of the hill at Mineral Slide.

Q. What happened to the water in Little Butte in the summer time after this Powers Ditch was abandoned? Did all the water in the summer time go down the Nickerson Ditch?

A. I could not swear to it; I did not have anything to do with it, I told you, there for a number of years.

Q. But you were up there, were you not, Mr. Bickford? A. Yes.

Q. Don't you know that in the summer time the water from Little Butte after the Powers Ditch was abandoned, all the water in the summer time came down the Nickerson Ditch? A. Yes, it did.

Q. And it came down to the ridge, the Mineral Slide ridge, didn't it, and was it not carried down there over to the lower end of the Powers Ditch?

A. Yes.

Q. And from there the people in Paradise were served? A. Yes.

Q. Now, at that time when the old Powers Ditch was first abandoned was there any water being turned out of this weir that you are talking about into Little Butte?

A. I don't know of any weir then." [321]

(Testimony of E. H. Bickford.)

The first I know of any weir in the Nickerson Ditch is when I built it in 1907. I am perfectly positive that that was under Mr. Durbrow's direction; that is the way I remember it; that it was under his administration.

“Q. You said that you had never seen any water higher than 4 or 5 inches from the top of the Nickerson Ditch. What height did you ordinarily run the water through the Nickerson Ditch?

A. I could not tell you now; it would depend on the amount of water there was in Butte Creek. It was not any higher than 4 or 5 inches. We aimed to keep the cross-gate so as not to let more than a certain amount through.

Q. Was this the letting out of the water that you talked about a little while ago, the letting out of the water over the weir so as to keep the water from being so high that it would overflow the ditch?

A. No.

Q. That is different, is it?

A. That is different.

Q. Now, during what periods of the year did you let water over this weir?”

As I remember when the water began to get low in the creek and there was none flowing over the head-dam there was a certain amount to be turned out at this weir. That was during only a part [322] of the summer months when the water was low in the creek, during the dry season.

“Q. My question was whether that was during all the summer months between 1907 and 1909 when you

(Testimony of E. H. Bickford.)

were there, or during only a part of the summer months.

A. Just part of it, when the water was low in the creek.

Q. What part of it?

A. The dry season, of course.

Q. Is the dry season only during the summer months or does it extend further into the year than during the summer months?

A. It would be 3 or 4 months, in the dry season.

Q. You don't know the precise times then when the water was turned into Little Butte, do you?

A. No, I could not swear to any date."

Redirect Examination.

I kept time-books when I was working for the company. One of these books I gave to Mr. Durbrow at Chico, something over a week ago. He asked me about this case and I told him all I recollected about it. The first I knew about this case was when Mr. Davis came to my house to see me. I am here in response to a subpoena that was served on me by the defendant.

I have seen the Mowry spillway open when I did not shut it; this was at different times; I reported it. I reported that the Bader Mine was taking water to Mr. Durbrow and he said something about he would see about it.

"Q. Now, you stated that there was no water flowing down Little Butte Creek in the summer time below the Nickerson head-dam. Did you mean by that no water except what you turned out at this weir?

(Testimony of E. H. Bickford.)

A. That was the idea."

Recross-examination.

At the time I saw the spillway leading down to the Bader [323] Mine open I supposed there was arrangements made for it; I did not know. Mr. Durbrow asked me to come down here to testify, but I did not.

**Evidence Introduced by Testimony of B. L. McCoy,
Called by Defendant.**

The MASTER.—Q. What is your age?

A. 48.

Mr. CROSS.—Q. Where do you reside, Mr. McCoy? A. In Oroville, California.

Q. What is your occupation?

A. Civil engineer and surveyor.

Q. How long have you been such?

A. About 28 years.

Q. Were you County Surveyor at one time?

A. Twelve years.

Q. Of Butte County? A. Of Butte County.

Q. Do you remember of making any survey of the Nickerson Ditch?

Mr. ORRICK.—I object to that as immaterial, irrelevant and incompetent and not rebuttal.

Mr. BRANDT.—It is a preliminary question.

The MASTER.—Do you propose to go into more evidence with respect to the survey of that ditch?

Mr. CROSS.—No, just to show what was done on that ditch.

Mr. BRANDT.—In 1906 and 1905.

The MASTER.—I will overrule the objection.

(Testimony of B. L. McCoy.)

A. Well, in January and February, 1906, I did.

Mr. CROSS.—Q. Do you know a man by the name of Murphy? A. Yes, I do.

Q. Did Murphy do work at that time on the ditch?

Mr. ORRICK.—Object to that, your Honor, upon the grounds already stated.

Mr. CROSS.—I think we can produce the Surveyor that did that work.

The MASTER.—There is no dispute about this point, is there? [324]

Mr. BRANDT.—We want to know what was done. One side said it was cleaned and the other side said it was enlarged.

Mr. ORRICK.—They started to show what the capacity of this ditch was, they called Mr. North, and they went into that thing fully and they rested their case and we put in our proof and now they think that they are making a scoop by bringing in a lot of witnesses at this hour of the case; I protest against it as unfair.

Mr. CROSS.—We are not trying to do anything of the sort, and you know we are not.

Mr. ORRICK.—I know you are.

The MASTER.—What do you propose to prove by Mr. McCoy?

Mr. BRANDT.—To prove the exact character of work that was done in 1906 and 1905, to prove the capacity was increased, humps taken out of the dam and rock blasted out of it.

The MASTER.—All that is in evidence. It is in evidence by both parties.

(Testimony of B. L. McCoy.)

Mr. BRANDT.—It is, except that.

The MASTER.—That is Mr. Durbrow's testimony and it is Mr. Bickford's testimony, and it is the testimony of other witnesses. The only question is whether that amounts to a cleaning out or an enlargement.

Mr. BRANDT.—This witness can tell whether it would affect its capacity.

The MASTER.—I will sustain the objection.

Mr. CROSS.—Q. Have you been along that ditch, Mr. McCoy, other than the time you surveyed it?

A. Yes.

Q. Are you acquainted with the soil through which the ditch runs between the Mowry spillway and the head-dam? A. Yes.

Q. What is the character of the soil?

A. Partially through lava and bed-rock and red soil.

Q. Have you ever seen that ditch running full?
[325]

Mr. ORRICK.—I object to that upon the grounds already stated.

The MASTER.—I think we have had enough on that. What do you propose to prove by Mr. McCoy in that regard?

Mr. CROSS.—We want to show that in his opinion the ditch could run within a very few inches of the top with safety, owing to the character of the soil and the rock through which the ditch is constructed between the Mowry spillway and the head-dam of the ditch.

(Testimony of B. L. McCoy.)

The MASTER.—I think we have had enough of that. I will sustain the objection.

Mr. CROSS.—Q. Have you visited the Mowry Mine after 1906? A. Yes.

Q. Have you ever made any surveys there?

Mr. ORRICK.—The same objection.

The MASTER.—I will allow that question.

A. In May 1908, and in May, 1911.

Mr. CROSS.—Q. Were they using water at the mine at that time? A. Yes.

Mr. ORRICK.—I object to that upon the further ground that this testimony infringes on the ruling already made.

The MASTER.—I cannot see anything in the evidence.

Mr. CROSS.—It is perhaps slightly cumulative.

The MASTER.—I will rule out all cumulative evidence. Cases are never tried by the number of witnesses on each side; at least they are never decided that way; one man may prevail against another.

Mr. CROSS.—That is all.

Evidence Introduced by Testimony of William J. Newman, Recalled for Defendant.

I am sixty-six years old and reside at 3441 Clay Street in this city, and am a member of the firm of Newman-Magnin [326] & Co. Since 1903 off and on for a week at a time I have been at the Bader Mine near Magalia. These visits were made in winter and summer both. Since 1906 the Bader Mine, to the best of my recollection, has been getting its water out of the Nickerson Ditch. When I was at

(Testimony of William J. Newman.)

the mine on these visits I lived at Magalia, and would go down to the mine every day I was up there except the day of leaving. On these trips down to the mine I would quite often go over the Mowry spillway on the Nickerson Ditch.

“Q. During these times did you see the gate open and the water running down to the mine?

Mr. ORRICK.—I object to that as immaterial, irrelevant and incompetent and not rebuttal. If they are going into this thing again—

Mr. CROSS.—(Intg.) This is practically our last witness.

Mr. ORRICK.—You have been saying that from the beginning.

The MASTER.—Of course my mind does not carry all these dates exactly, or the relative position of the parties. What do you want to prove by Mr. Newman? That since that time he has seen water flowing in this spillway?

Mr. BRANDT.—That on the occasion of every visit he made, and he has been up there every year, he has seen it.

The MASTER.—There is nothing new in that. I think we had better not go into that, Mr. Cross. I do not pretend to decide on the issue one way or the other. I have forgotten whether the parties are at issue on it as a matter of fact. But I don't think that this is the time for having additional witnesses on that matter.”

(Before the last witness was called the Master had permitted the witnesses T. J. Irwin, L. Cohn, Will-

(Testimony of William J. Newman.)

iam C. Bader, A. M. Glover, and E. H. Bickford, to testify as appears from the statement of their testimony last herein contained, over the objection of the plaintiff [327] that the matter testified to was not rebuttal.

EVIDENCE INTRODUCED BY PLAINTIFF IN SURREBUTTAL.

Evidence Introduced by Testimony of William Durbrow, Recalled by Plaintiff.

I saw the document produced here by Mr. Fowler yesterday. I probably furnished the information contained in the [328] document so far as the matters that are filled in in pencil are concerned. I will explain it in this way: Mr. Kalenborn, whose signature is on that, was one of our engineers and he would come to me always to get that information; that is, I would be the only one that had the information and the only one he would come to. He was in the adjoining office and I gave him that information. He had no information of his own whatever. I gave him the information with reference to the forty second-feet in that document. The Government wanted the capacity of the Nickerson Ditch. Now, the capacity of the Nickerson Ditch might mean a number of things. It might mean the number of inches of water coming in at the head, it might mean the water delivered at the end of the ditch, it might mean the average flow throughout the year, it might mean the maximum or the minimum flow throughout the year; all those things had to be taken into consideration—the Nickerson Ditch is built to a larger

(Testimony of William Durbrow.)

capacity at the lower end. Now, to get at any kind of an idea what the capacity of that ditch was, you would merely have to take and make an average of all these things; the ditch at the lower end might carry 6,000 or 7,000 inches; in other words, to fill up that reservoir, if the Kunkle Ravine or Dry Creek would carry that amount of water, 6 or 7,000 inches for a few hours, it would help out very materially. At the same time I did not want to give 6 or 7,000 inches as the capacity of the Nickerson Ditch, nor did I want to give the capacity at the head-dam where the least capacity was. I want to add that this 40.1 is evidently a mistake because we never aimed to give any exact information of that sort; 40 second-feet means 2,000 inches, and was merely struck off as the average or as a capacity that would answer the Government's requirements. [329] I had more in mind giving merely an approximation. It really had nothing to do with power or irrigation. What I wanted to give, what I was trying to give, was purely an approximation; I might as well have given 50 or 60 second-feet, and that would have been just as correct for the Government's report. The 40 second-feet is no more correct than 50 or 60 would be, because it is merely an approximation of the capacity of that ditch, because it varies all the way from the head, 1,400 or 1,500 inches, to the lower end, about 6,000 or 7,000 inches.

I never requested Mr. Bickford to turn any water in the summer time from the Nickerson Ditch into Little Butte. It is possible that some time there was

(Testimony of William Durbrow.)

some particular occasion for a day or two; somebody wanted water down there for stock purposes, or mining, or something. It might have been for two or three days that I told him, but certainly I never gave him any instructions to turn water regularly out of the Nickerson Ditch into Little Butte Creek. I could not have, because the whole circumstances would keep me from giving him any such general instructions. I mean that we needed all that water; that we would have a riot down at Paradise if we did not take all the water that could be obtained at Little Butte and take it down to Paradise section for irrigation. They needed every bit of it, and they were entitled to every bit of it. We needed every bit of it and took every bit of it.

There was a weir put on Dry Creek over which water was turned down into the Nickerson Ditch. When we extended the Nickerson Ditch and crossed Dry Creek, we crossed right through with the ditch. Now, that meant that the ditch took all of the Dry Creek water into the ditch, so, to satisfy the owners along Dry Creek, so that the water that naturally made in Dry Creek was turned out of the ditch, so that the riparian owners along Dry Creek were not deprived of the water that originally belonged in the ravine. I would not say positively who built the weir in Dry Creek. My memory is that Mr. Bickford built it. [330]

There is a flume or two in there and as I remember it he built those flumes and extended that ditch. I never gave any instructions to Mr. Bickford to

(Testimony of William Durbrow.)

build a weir on the Nickerson Ditch which would be available for turning the water from the Nickerson Ditch into Little Butte. There was no such weir there the last time I was there and not at any time did I ever see a weir on the Nickerson Ditch. The last time I was on the Nickerson Ditch was probably in 1908 or possibly 1909.

Cross-examination.

There is a gate in the flume below the head-dam by which the water can be let out into Little Butte Creek. Such a contrivance might be called a weir if it was used as a weir. You could put a board in there and let the water go over the top of that board and you could call it a weir. There are several different uses made of the word weir. I think we have used them both in this case. A weir in one way is used for the measurement of water. It is a sharp edge, level, sharp edge, over which water will run confined between certain points, and the height is measured of the water running over that sharp edge, and that is used in a certain formula to find the amount of water that is running in that stream. Then a weir is also used as any sharp edge put into a stream to hold a stream back. The crest of a dam might be spoken of as a weir, and I think I used it in that connection. Mr. Bickford apparently meant, in speaking of a weir, he probably would mean, something put in to measure water.

Mr. CROSS.—Q. Couldn't he also mean, Mr. Durbrow, some obstruction put into the flume which would divert the water out through a gate beside the

(Testimony of William Durbrow.)

flume, the same as an obstruction put in the stream would divert the water from Little Butte Creek into the Nickerson Ditch?

A. No; an obstruction cannot be a weir. The dam could not be a [331] weir until the water is flowing over it.

Q. An obstruction could be put in so as to divert some water out and still leave the rest of it flow over the top of the weir, couldn't it, in the flume?

A. The obstruction would not be a weir."

When I say I did not instruct Mr. Bickford to put a weir in, to the best of my recollection I mean I did not instruct him ever to put anything in to measure water out of there. I did not instruct him to put in a gate or spillway. There was a gate in there. Mr. Bickford was the one who probably replaced that gate when the flumes were replaced. I never instructed him to let the water out of there in the summer time with the reservation that it is possible at some time I might have told him to let it out for a few days, but not as a practice.

I remember Mr. Kalenborn coming to me for information. Just the exact piece of information contained in the report to the Forest Commission I do not remember, but there is no question but that he did get it from me. I would not be able to say that I remember just exactly this report and giving him that information just for that report.

Evidence of E. H. Bickford, Recalled for Plaintiff.

Evidence of E. H. BICKFORD, recalled for plaintiff in further rebuttal, testified as follows:

Mr. ORRICK.—Q. Can you state, Mr. Bickford, whether or not the water which you say was let into Little Butte from the Nickerson Ditch was let in all the time during the summer, or only a few days during the summer, or what?

A. Well, I can't remember whether we let it run all the time, or whether—I don't think we did, but then I can't remember how much [332] was let out, or how long it run.

The MASTER.—Q. All you remember is the fact of its being let out during the summer on Mr. Durbrow's order?

A. That is the way, that is as near as I remember.

Q. Without respect to duration? A. Yes.

Both parties thereupon rested."

It is hereby stipulated that the foregoing is a true and complete statement of the evidence introduced by the respective parties on the trial of the above-entitled cause.

R. H. CROSS,

ARTHUR H. BRANDT,

Attorneys for Defendant and Appellant.

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W. H. ORRICK,

GOODFELLOW, EELLS, MOORE &
ORRICK,

Attorneys for Complainant and Respondent.

It appearing that the foregoing is a true and complete statement of the evidence introduced by the respective parties on the trial of the above-entitled cause, the same is hereby approved.

Dated Mch. 27, 1917.

WM. H. HUNT,
Judge.

[Endorsed]: Filed Mar. 27, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [333]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corporation,
Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corpora-
tion,

Defendant.

Petition for Allowance of Appeal.

Bader Gold Mining Company, a corporation, defendant in the above-entitled suit, conceiving itself aggrieved by the judgment and decree made and entered in the above-entitled cause on the 25th day of May, 1915, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and defendant prays that this, its petition for the said appeal, may be allowed, and that a transcript of the papers and records upon which said judgment and decree was made, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, duly authenticated.

Dated this 22d day of November, A. D. 1915.

BADER GOLD MINING COMPANY,

By R. H. CROSS,

Its Solicitor. [334]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

#15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corporation,
Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corporation,
Defendant.

Defendant.

Assignment of Errors.

In pursuance of the rules and practice of the United States Circuit Court of Appeals for the Ninth Circuit, and of the Statutes in such case made and provided, the defendant, Bader Gold Mining Company, a corporation, respectfully makes the following Assignment of Errors in the above-entitled cause to be relied upon by it in its appeal from the decree made and entered in the above-entitled cause on the 25th day of May, 1915:

I.

That the District Court erred in entering said decree appealed from for the reason that it appears from the record that complainant is not entitled to said decree, or to the relief prayed for against this defendant.

II.

That said Court erred in finding that the complainant, Oro Electric Corporation, a corporation, is the owner of that certain water ditch situated in the County of Butte, State of California, known as the Nickerson Ditch, for the reason that said finding and decree is uncertain and without legal meaning, in that the exact extent and character of the right decreed to the complainant is not defined or established. [335]

III.

That said Court erred in holding and decreeing that the defendant has no right, title or interest in or to said Nickerson Ditch, or any part thereof, nor has any right to enter upon said ditch nor interfere therewith, nor disturb complainant's possession thereof, nor any right (excepting upon obtaining plaintiff's permission and paying the legal rates therefor) to divert or take any of the water which now is or may hereafter be in said ditch.

IV.

That said Court erred in holding and decreeing that a writ of permanent injunction issue against this defendant enjoining and restraining it from in any form or manner, directly or indirectly, asserting any right, title, interest or claim in or to said ditch, or any part thereof, or from entering upon or in any way interfering with said ditch, or any part thereof, or any flume, gate or spillway therein, or forming a part thereof, or used by complainant in connection therewith, or from opening or operating, or from preventing complainant, Oro Electric Cor-

poration, its servants, agents, workmen or employees from closing, either permanently or temporarily, the spillway or gate situated in the west side of said ditch in the northwest quarter of section one, township twenty-two north, range three east, Mount Diablo Base and Meridian, known as the "Spillway of Bader Mine," or any spillway, gate or other contrivance in said ditch for regulating or manipulating the flow of water therein or therefrom, or (excepting upon obtaining the permission of plaintiff, and paying the lawful rates therefor) from diverting or taking, or causing to be diverted or taken, any of the water which now is or may hereafter be in said ditch. [336]

V.

That said Court erred in entering said judgment and decree for the reason that it appears from the record that the complainant and its predecessors in interest had diverted from Little Butte Creek, at a point above the lands of defendant, water to the use of which the defendant, as lower riparian owner, and as appropriator, was entitled, and that thereafter, while said complainant was conducting and transporting said water in an open ditch across the lands of defendant, defendant merely took from said ditch, at a point on its own land where the same was crossing, water to the use of which it would have been entitled had the same been permitted by said complainant to flow in its usual course down Little Butte Creek.

VI.

That said Court erred in entering said judgment

and decree for the reason that it appears from the record that the defendant, in taking water out of said Nickerson Ditch at a point on its land where said ditch was crossing the same, did not interfere with any easement right possessed by the complainant across the land of the defendant, and that the use of said water from said ditch was not inconsistent with any right of the complainant therein.

VII.

That said Court erred in entering said judgment and decree for the reason that it appears from the record that the complainant's cause of action is barred by the statute of limitations.

VIII.

That said Court erred in entering said judgment and decree for the reason that it appears from the record that defendant has been, for more than five years before the commencement of said [337] action, in the quiet, open and continuous possession of the right to conduct, through said Nickerson Ditch, to a point on its land, five hundred miner's inches of water, to the use of which said defendant is entitled, and to take the same from said ditch at a point thereon near defendant's mine, holding and claiming said right adversely to all persons under a claim of legal right so to do, and thereby has acquired a prescriptive right to conduct said water through said Nickerson Ditch.

IX.

That said Court erred in entering said judgment and decree for the reason that it appears from the record that the complainant has been guilty of laches in commencing its action.

X.

That said Court erred in entering said judgment and decree for the reason that it appears from the record that the complainant has come into court with unclean hands, and is in such an inequitable position as to preclude the granting of the injunction prayed for.

XI.

That said Court erred in not sustaining the Exception (I) taken by this defendant to the ruling of the Standing Master in Chancery made on the first day of the hearing of this cause before said Master, denying defendant's motion to dismiss the proceedings on complainant's submission of the case on the pleadings, and requiring defendant to go forward with the presentation of proof.

XII.

That said Court erred in holding and concluding, as a matter of law, and in not sustaining the Exception (II) taken by this defendant to the Master's holding and conclusion, that the [338] title to the water flowing in Little Butte Creek and in the Nickerson Ditch is not an issue in the cause.

XIII.

That said Court erred in holding and concluding, as a matter of law, and in not sustaining the Exception (IV) taken by this defendant to the Master's holding and conclusion, that the ownership and possession by complainant and its predecessors, at all relevant times, of the Nickerson Ditch, is not an issue in this cause.

XIV.

That said Court erred in holding and concluding,

as a matter of law, and in not sustaining the Exception (V) taken by this defendant to the Master's holding and conclusion, that there is no issue in this cause on the allegation that defendant interfered with the easement right possessed by complainant, both by diverting the water and by obstructing the ditch.

XV.

That said Court erred in holding and concluding, as a matter of law, and in not sustaining the Exception (VI) taken by this defendant to the Master's holding and conclusion, that the allegations contained in the first three paragraphs of the second defense pleaded by defendant do not constitute a defense to said action, and that if, as a matter of fact, the plaintiff, or its predecessors in interest, had diverted from Little Butte Creek, at a point above the lands of defendant, water to the use of which the defendant, as lower riparian owner, or as appropriator, was entitled, and thereafter was conducting and transporting said water in an open ditch across the lands of defendant, said defendant would not thereby, as a matter of law, be entitled to take from said ditch at a point on its land where the same was crossing, the water to the use [339] of which it would have been entitled had the same been permitted to flow in its usual course down Little Butte Creek.

XVI.

That said Court erred in holding and concluding, as a matter of law, and in not sustaining the Exception (VII) taken by this defendant to the Mas-

ter's holding and conclusion, that the allegations contained in the third defense set out in the answer of the defendant, do not constitute a defense in law, and that if, as a matter of fact, the plaintiff or its predecessors in interest, diverted water from Little Butte Creek into the Nickerson Ditch, to the use of which defendant, as lower riparian owner, or as appropriator, was entitled, and thereafter conducted and transported said water through said Nickerson Ditch over the lands of the defendant, that said defendant would not be entitled to take from said ditch at a point on its land for use on said land, the water to the use of which it would have been entitled had said water been permitted to flow down Little Butte Creek, even though the taking of said water at a point on its land, and the use of said ditch for the transportation thereof to said point, was not inconsistent with or in interference of any easement right possessed by plaintiff across the land of the defendant.

XVII.

That said Court erred in not sustaining the Exception (VIII) of this defendant to the findings and report of the Master "that the Master failed to find on the evidence adduced on the fact whether the Nickerson Ditch was enlarged by plaintiff, or its predecessors, in or about the year 1906 from the intake of said ditch on Little Butte Creek to the spillway on defendant's land to such an extent as to substantially increase the capacity of said ditch, and that the Master failed to find the amount of such increase, if in fact increased, expressed in Statutory miners' inches." [340]

XVIII.

That said Court erred in not sustaining the Exception (IX) taken by this defendant to the Master's findings and report, "that the Master failed, on the evidence adduced, to find on the fact whether the plaintiff, or its predecessors in interest, in 1906, or thereabouts, diverted and has ever since been diverting the water flowing in Little Butte Creek, or any portion of the water flowing in Little Butte Creek, whether in summer or winter, to the use of which the defendant was, either as lower riparian owner or as appropriator, entitled."

XIX.

That said Court erred in not sustaining the Exception (X) taken by this defendant to the report and findings of the Master "that the Master failed, on the evidence adduced, to find on the respective rights of the plaintiff and defendant in and to the waters flowing in Little Butte Creek, or in the Nickerson Ditch."

XX.

That said Court erred in not sustaining the Exception (XI) taken by this defendant to the Master's findings and report, "that the Master failed, on the evidence adduced, to find that the property of the defendant over which the Nickerson Ditch extends, is riparian to Little Butte Creek at a point below the dam and intake of said Nickerson Ditch."

XXI.

That said Court erred in not sustaining the Exception (XXIV) taken by this defendant to the Master's finding, and in finding, that defendant

company, in the period from 1906 to 1909, used the water from the Nickerson Ditch only occasionally and not in such a manner as to raise a foundation for prescription. [341]

XXII.

That said Court erred in not sustaining the Exception (XXV) taken by this defendant to the finding of the Master, and in finding, that the water that was taken by defendant company from the Nickerson Ditch in the years intervening between 1906 and 1909, was taken without the complainant's knowledge, and surreptitiously, and that there was no open use of the ditch until after the year 1909.

XXIII.

Said Court erred in not sustaining the Exception (XXVI) taken by this defendant to the finding of the Master, and in finding, that it was a custom for the defendant company to use the water in the Nickerson Ditch for a brief period of perhaps twenty minutes at a time, for the purpose of precluding discovery of said usage.

XXIV.

That said Court erred in not sustaining the Exception (XXX) taken by this defendant to the finding and conclusion of the Master, and in finding, that defendant's use of the Nickerson Ditch and of the water through its spillway was several times interrupted by complainant's employees.

XXV.

That said Court erred in not sustaining the Exception (XXXI) taken by this defendant to the report and findings of the Master, "that said Master

failed to find, upon the evidence adduced, the specific acts constituting the interruptions so found by the Master.”

XXVI.

That said Court erred in holding and concluding, as a matter of law, and in not sustaining the Exception (XXXII) taken by [342] this defendant to the Master’s holding and conclusion that complainant’s action is not barred by the Statute of Limitations.

XXVII.

That said Court erred in holding and concluding, and in not sustaining the Exception (XXXIII) taken by this defendant to the Master’s holding and conclusion, that the defense of laches raised by defendant is not sustained by the evidence.

XXVIII.

That said Court erred in holding and concluding, and in not sustaining the Exception (XXXIV) taken by this defendant to the Master’s holding and conclusion, that the complainant has not come into court with unclean hands, and is not in such an inequitable position as to preclude the granting of an injunction.

XXIX.

That said Court erred in not sustaining the Exception (XXXV) taken by this defendant to the ruling of the Master made on the hearing of said cause (to which ruling an exception was duly taken at said time), ruling out and rejecting and excluding the offered testimony of the witness B. L. McCoy, which said offered testimony was in substance

as follows: That said witness had made a survey of the Nickerson Ditch in 1905 and 1906, for the predecessor of complainant company, and that said ditch, at said time, was enlarged, and its capacity increased.

XXX.

That said Court erred in not sustaining the Exception (XXXVI) of this defendant to the ruling of the Master made on the hearing of this cause (to which ruling an exception was duly taken at said time) ruling out, excluding and rejecting the offered testimony of the witness William J. Newman, which testimony was in substance, as follows: That the witness had been at the Bader mine [343] for a week at a time, off and on, since the year 1903, his visits being made both in the summer and winter; that since the year 1906 the Bader Gold Mining Company had been getting its water out of the Nickerson Ditch; that on these visits, in going and coming from Magalia to the mine, he quite often passed near the Bader Spillway in the Nickerson Ditch, and that on the occasion of every visit made by him, he had seen the gate open and the water running down to the mine.

XXXI.

That said Court erred in not sustaining the Exception (XXXVII) taken by this defendant to the finding of the Master, and in finding, that for a portion of the time between the years 1893 and 1896 or 1900, the witness Mowry paid for water.

XXXII.

That said Court erred in not sustaining the Ex-

ception (XLI) taken by this defendant to the holding and finding of the Master, and in finding, that defendant's claim to a prescriptive right to the use of a portion of the Nickerson Ditch, or the right to take water therefrom, is not sustained by the evidence presented.

XXXIII.

That said Court erred in not sustaining the Exception (XLIII) taken by this defendant to the report and findings of the Master "that the Master failed to find upon the fact whether the plaintiff's title to the Nickerson Ditch arose in grant or by prescription, and that he failed to find, if it arose by prescription, the extent of the user of the easement while the prescriptive title was ripening."

XXXIV.

That said Court erred in not sustaining the Exception (XLIV) taken by this defendant to the findings and report of the [344] Master "that the Master failed to find upon the evidence adduced the usual and customary daily amount of water expressed in statutory miner's inches taken and diverted by defendant company from the Nickerson Ditch during the period beginning in 1906 and ending at the time of the commencement of this action, when such water was needed, and was used by said defendant."

XXXV.

That said Court erred in holding and concluding, as a matter of law, and in not sustaining Exception (XLV) taken by this defendant to the holding and conclusion of the Master, that it is not necessary

that the complainant, to entitle itself to a decree, should measure and define its easement right across the lands of the defendant in terms of the amount of or by the particular description of the water which it is entitled to flow across said lands.

XXXVI.

That said Court erred in not sustaining the Exception (XLV) taken by this defendant to the findings and report of the Master "that the Master failed, on the evidence adduced, to find the exact extent and character of the easement right of complainant across defendant's land."

XXXVII.

That said Court erred in not sustaining the Exception (XII) taken by this defendant to the findings and report of the Master; "that said Master, in said report, recited facts at length relevant and pertinent only to the question of the respective rights of plaintiff and defendant in and to the water of Little Butte Creek, and the Nickerson Ditch, to the question whether the Nickerson Ditch was enlarged in 1906, and to the question whether all or any of the water flowing in Little Butte Creek, to the use of which defendant was entitled, was diverted in that year into [345] said ditch, all of which said questions the Master, in his said report, holds immaterial, and disavows any intention of finding upon.

XXXVIII.

That said Court erred in not sustaining the Exception (XIII) taken by this defendant to the finding and statement of the Master, and in finding, that the Oro Water, Light & Power Co. transferred and

conveyed to the Oro Electric Corporation, plaintiff herein, on May 12th, 1912, the ditch referred to in said report as the Powers Ditch.

XXXIX.

That said Court erred in not sustaining the Exception (XIV) taken by this defendant to the Master's finding and statement, and in finding, that the Thermalito Colony used water from Little Butte Creek through the Powers Ditch from the late 80's until the transfer of said Powers Ditch to the Oroville Water Co. in 1898.

XL.

That said Court erred in not sustaining the Exception (XV) taken by this defendant to the finding and statement of the Master, and in finding, that an arrangement existed between Jones and McLaughlin when they were respectively interested in the Powers and Nickerson Ditches, for the joint use of said ditches, and that the respective water rights attaching to the said ditches were in some manner consolidated and merged.

XLI.

That said Court erred in not sustaining the Exception (XVI) taken by this defendant to the finding and statement of the Master, and in finding, that after 1890, the Nickerson Ditch took all the water in the summer time flowing in Little Butte Creek.
[346]

XLII.

That said Court erred in not sustaining the Exception (XVII) taken by this defendant to the Master's finding and statement, and in finding, that after

1892 all the water in the Nickerson Ditch was used by the farmers below the intake of said ditch in the summer time.

XLIII.

That said Court erred in not sustaining the Exception (XVIII) taken by this defendant to the finding and statement of the Master, and in finding, that the appropriation of water in Little Butte Creek, in 1899 by G. B. Mowry, and the building of a dam by him across Little Butte Creek, was for the purpose only of securing winter water, and avoiding buying the same.

XLIV.

That said Court erred in not sustaining the Exception (XIX) taken by this defendant to the Master's finding and statement, and in finding, that the use made of the Mowry Ditch prior to the year 1906, was negligible.

XLV.

That said Court erred in not sustaining the Exception (XX) taken by this defendant to the Master's statement and finding, and in finding, that G. B. Mowry, made arrangements for the purchase of water from the predecessor in interest of the plaintiff, and did not, as testified to by said witness, make arrangements only for the use of the Nickerson Ditch.

XLVI.

That said Court erred in not sustaining the Exception (XXI) taken by this defendant to the Master's finding and statement, and in finding, that the reason that no further negotiations were had be-

tween the defendant and the owners of the Nickerson Ditch [347] after 1906 was due to the belief of G. B. Mowry that it would be more difficult to get water by permissive use or for a moderate flat rate than theretofore, and that it was natural that he should fall back upon his rights of appropriation.

XLVII.

That said Court erred in not sustaining the Exception (XXII) taken by this defendant to the Master's finding and statement, and in finding, that G. B. Mowry, the manager of defendant company, did not protest against the claimed enlargement of the Nickerson Ditch to the defendant's property, and did not notify said company of its claim to the water, or state that he would use the Nickerson Ditch to carry it, as testified to by said G. B. Mowry.

XLVIII.

That said Court erred in not sustaining the Exception (XXIII) taken by this defendant to the finding of the Master, and in finding, that the last bill rendered to the defendant company was in April, 1906.

XLIX.

That said Court erred in not sustaining the Exception (XXVII) taken by this defendant to the ruling of the Master made at the time of the hearing of this cause (to which ruling an exception was duly taken at said time) admitting the testimony of the witness N. A. Biek over the objection of defendant, which testimony was in substance that one Bishop had told said witness that G. B. Mowry, the manager of defendant company, had ordered him to

turn the water on fifteen or twenty minutes at a time, and then turn it off for half an hour, so that it would catch up and the water company would not miss it.

L.

That said Court erred in not sustaining the Exception [348] (XXVIII) taken by this defendant to the Master's finding, and in finding, that on both occasions on which the witness N. A. Biek found Bishop at the gate of the Nickerson Ditch on the land of defendant, said Bishop closed the gate after protest from the company's representatives.

LI.

That said Court erred in not sustaining the Exception (XXIX) taken by this defendant to the Master's statement and finding, and in finding, that no cross-gate was placed in the Nickerson Ditch below the spillway on the lands of defendant, until August 19th, 1912, and that prior to that time all of the water in the Nickerson Ditch was not diverted at any time through the defendant's property.

LII.

That said Court erred in not sustaining the Exception (XXXVIII) taken by this defendant to the Master's statement and finding, and in finding, that the mining done by the witness G. B. Mowry after 1892, was done in the winter season when the water was not sufficient for irrigation.

LIII.

That said Court erred in not sustaining the Exception (XXXIX) taken by this defendant to the Master's finding, and in finding, that the Snow Ditch

went out of use about the year 1890, and was not thereafter used.

LIV.

That said Court erred in not sustaining the Exception (XLII) taken by this defendant to the Master's finding, and in finding, that the Mowry Ditch, during the summer, was fed only by reservoired water proceeding from springs and other sources of supply below the Nickerson dam, together with a small leakage from that dam, and was not supplied by the water flowing in Little Butte Creek. [349]

LV.

That said Court erred in not sustaining the Exception (XL) taken by this defendant to the Master's statement and finding, and in finding, and according to the witness G. B. Mowry's own statement, that the defendant's use of the water from the Nickerson Ditch was several times interrupted.

WHEREFORE, this defendant, Bader Gold Mining Company, prays that the said judgment and decree of the District Court of the United States, for the Northern District of California, Second Division, may be reversed.

Dated November 22d, 1915.

BADER GOLD MINING COMPANY,

By R. H. CROSS,

Solicitor. [350]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

#15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corporation,
Plaintiff,

Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corporation,
Defendant.

Defendant.

**Order Granting Petition on Appeal and Fixing
Amount of Bond.**

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

It is further ordered that the bond on appeal be fixed at the sum of \$500.

Dated November 22d, A. D. 1915.

WM. C. VAN FLEET,

Judge of the United States District Court, Northern District of California, Second Division.

[Endorsed]: Filed Nov. 22, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [351]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

#15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corporation,
tion,

Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corporation,
tion,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Bader Gold Mining Company, a corporation, as principal, and National Surety Company, a corporation, as sureties, are held and firmly bound unto the complainant in the above-entitled cause in the full and just sum of \$500, to be paid to said complainant, its successors or assigns, for which payment, well and truly to be made; we bind ourselves, representatives, executors and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of November, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a session of the District Court of the United States, Northern District of California, Second Division in a suit pending in said Court between the above-named complainant, and the above-named defendant, said defendant having ob-

tained from said Court an order allowing its appeal to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to reverse the judgment and decree entered in said cause on May 25th, 1915, and a citation to said complainant is about to be issued citing and admonishing it to be and appear in the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be holden in San Francisco. [352]

NOW, the condition of the above obligation is such, that if the said defendant shall prosecute its said appeal to effect and shall answer all costs that may be awarded against it if it fails to make its plea good, then the above obligation is *to void*; otherwise to remain in full force and effect.

BADER GOLD MINING COMPANY.

By A. C. BALLINGALL,
President.

By J. H. SAYRE,
Secretary.

[Seal National Surety Co.]

NATIONAL SURETY COMPANY.

By FRANK L. GILBERT,
Attorney in Fact. [353]

State of California,
City and County of San Francisco,—ss.

On this 23d day of November, in the year one thousand nine hundred and fifteen, before me, John McCallan, a notary public in and for the said city and county of San Francisco, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name

is subscribed to the within instrument as the attorney in fact of National Surety Company, and he acknowledged to me that he subscribed the name of National Surety Company thereto as principal and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California. [354]

APPROVAL BY COURT.

The foregoing bond is hereby approved as to form and amount and sufficiency of sureties, this 23d day of November, A. D. 1915, as a cost bond on appeal, but not as a supersedeas bond on appeal.

WM. C. VAN FLEET,

Judge of the United States District Court, for the Northern District of California, Second Division.

[Endorsed]: Filed Nov. 24, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [355]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,620.

ORO ELECTRIC CORPORATION, a Corporation,

Complainant,

vs.

BADER GOLD MINING COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred sixty (360) pages, numbered from 1 to 360, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$222.40; that said amount was paid by R. H. Cross, Esq., attorney for defendant; and that the original citations issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 3d day of April, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,
Clerk United States District Court, for the Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk. [361]

*In the District Court of the United States, for the
Northern District of California, Second Divi-
sion.*

No. 15,620—IN EQUITY.

ORO ELECTRIC CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

BADER GOLD MINING COMPANY, a Corpora-
tion,

Defendant.

Citation on Appeal.

United States of America,—ss.

The President of the United States to Oro Electric
Corporation, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals, for the Ninth Circuit, to be holden at the city
of San Francisco, in the State of California, within

thirty (30) days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office, of the District Court of the United States for the Second Division of the Northern District of California, wherein Bader Gold Mining Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment and decree rendered against the appellant and entered on the 25th day of May, 1915, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, Northern District of California, Second Division.

Dated this 22d day of November, A. D. 1915.

WM. C. VAN FLEET,
Judge of the United States District Court, Northern
District of California, Second Division.

[Endorsed]: #15,620—In Equity. In the United States District Court for the Northern District of California, Second Division. Oro Electric Corporation, a Corporation, Plaintiff, vs. Bader Gold Mining Company, a Corporation, Defendant. Citation. Filed Nov. 24, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [362]

[Endorsed]: No. 2966. United States Circuit Court of Appeals for the Ninth Circuit. Bader Gold Mining Company, a Corporation, Appellant, vs. Oro Electric Corporation, a Corporation, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed April 3, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

